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In the Supreme Court of the United States.

No. 2 ORIGINAL—OCTOBER TERM, 1913.

COMMONWEALTH OF VIRGINIA,

v.

STATE OF WEST VIRGINIA.

IN EQUITY.

RESPONSE OF THE COMPLAINANT TO THE MOTION OF THE DEFENDANT SUBMITTED IN THE ABOVE ENTITLED CAUSE.

Appeals Press, 21 N. 12th St., Richmond, Va.

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And now comes the respondent, the Commonwealth of Virginia, by Jno. Garland Pollard, her Attorney-General, and contests and objects to the granting of leave to the State of West Virginia to file a supplemental answer to the bill of complaint, as set forth in the motion submitted in the above cause, with which motion in writing the proposed supplemental answer is exhibited, and for answer to the said motion says:

Seven grounds are assigned upon which this motion is based, the first of which is:

1. That the "value and disposition of the assets set up in the supplemental answer were discovered by the defendant since the last continuance"—that is to say, since November 13, 1913.

In response thereto, this respondent says: That she denies that she received the credits set forth in the statements filed as a basis for this motion; that while said credits are represented to have existed, they are in fact mere estimates as of January 1, 1861, based upon unwarranted assumptions.

Further answering, the respondent says: That more than eight years ago, after years of discussion and fruitless negotiation, as a last resort, this suit was instituted to bring about a settlement of the question of West Virginia's liability for a just proportion of the debt of Virginia, created before her dismemberment. After demurrer—argued and overruled—a maturely considered and carefully prepared answer was filed in October, 1907, by which the defendant, with the utmost distinctness and emphasis, set up her defense against the demands asserted by the complainant. Upon the lines of complaint and defense thus presented by the bill and answer issue was joined, and at an enormous expenditure of time, labor and money, the litigation was conducted until a decision was rendered by this court on the 6th day of March, 1911, settling the principles of the cause and fixing "the share of the principal of the debt of Virginia which West Virginia had assumed."

From the inception of this suit, and throughout its entire progress, up to and including the decision of the court

upon the merits of the case, the defendant has had the benefit of the services of two attorneys-general and seven able and distinguished lawyers associated with them and a corps of expert accountants, the latter of whom were engaged continuously under the direction of counsel for more than twelve months in investigating the records of your respondent relating to the subject matter of this suit contained in the Capitol, at Richmond, in the progress of which work every possible facility was afforded by the officers of your respondent having custody of these records.

The defense thus prepared was presented to the Master and the court upon elaborate oral and printed arguments, and all facts and circumstances which might be used in the interest of the defendant were marshalled and urged upon their attention with extraordinary ability. The Special Master, after an inquiry and examination on his part extending through a period of eighteen months, made a report to the court, covering many hundreds of pages of testimony, tabulated statements made by expert accountants, and copies from the records of all documents bearing upon or having any relation to the subject of Virginia's debt, and from this report of the Master and the evidence therein set forth, and after the cause had been submitted for final hearing, the court ascertained and decided that the amount of $7,182,507.46 was due by West Virginia as representing her share of the principal of said debt, leaving open only the question of what interest, if any, and the rate thereof should be paid by West Virginia upon that ascertained liability, and the correction of any possible errors of computation which may have been made in the calculations by which that result was reached.

Now, after the cause has been litigated for more than eight years upon lines of the defendant's own selection

and upon those presented by the record made up with infinite pains and labor with the assistance of trained and expert accountants employed by the defendant, and after every defense which the skill and resourceful ingenuity of her chosen counsel could bring forward from these records and the facts they disclosed, and the cause fought to a finish upon those deliberately chosen lines of defense and a decision rendered upon the main question involved, which decision has been reiterated and affirmed by the decision of the court rendered on the 30th of October, 1911, and again by its decision rendered on the 13th of November, 1913, the defendant comes into court in the beginning of this the ninth year of the litigation and asks to be permitted to assert a new line of defense, which has been all along open to her for her adoption, and to litigate the case over again upon these alleged new grounds.

If the grounds upon which this motion is based were meritorious, they should be so clear and explicit as to negative notice to the defendant of the material facts upon which her alleged defences are founded and also of any facts which would have reasonably put her upon inquiry; or which would, to say the least, by the use of ordinary diligence have informed her as to their existence.

But the truth as to these matters renders any reliance upon constructive notice or any refinements of reasoning unnecessary.

This respondent says that the defendant had full and complete notice and full knowledge of the facts upon which this motion is founded both before and during the pendency of this suit, and before and at the time of the filing of her answer to the bill in this cause, and before and at the time of the argument and submission of the same for final decision, all of which appears from the record.

In February, 1871, the legislature of West Virginia

adopted a joint resolution under which Messrs. John J. Jackson, A. W. Campbell and J. M. Bennett were appointed commissioners on the part of West Virginia to take up with Virginia the question of an adjustment of the public debt of Virginia prior to the 1st day of January, 1861. These commissioners made an independent investigation and submitted a report to the Governor of West Virginia, embodied in which were eight tabulated statements or schedules designated by the letters from "A" to "H," inclusive. Commissioner Bennett had been, before and during the war, the auditor of public accounts of the State of Virginia, and was thoroughly familiar with all facts in relation to her public debt, and was supposed to have been the author of that report; at all events, it has been since referred to as "Bennett's Report." This report, with its accompanying statements, was introduced into the record by the defendant; it is referred to in Exhibit No. 3 filed with the defendant's answer (see vol. 2, W. Va. Compilation, p. 28), and is printed in full in vol. 1 of W. Va. compilation beginning at page 457. The material facts as to all of the stocks, bonds and other property of the Commonwealth of Virginia, with one or two immaterial exceptions, as of the 1st day of January, 1861, will be found to be shown by the schedules marked "Statements" "B," "G," and "H," filed with this report. These statements furnish in great detail the facts as to the assets and public property of the Commonwealth which are now set forth as a basis for this motion.

Furthermore, the defendant's accountants prepared under the direction of her counsel a "balance sheet" called "Summary of cash receipts and disbursements of the Commonwealth of Virginia from March 17, 1823, to January 1, 1861," which the defendant filed with the record as "defendant's exhibit" (printed record, beginning at page 1053).

"Schedule No. 4" of this exhibit contains a list of "expenditures on account of banks and public internal improvements charged by the defendant to the present Commonwealth of Virginia" amounting to $27,586,527.60 (printed record, p. 1059); and under the caption "disbursements" are shown the several items consisting of "balances January 1, 1861," which it is now claimed to have been discovered "since the last continuance" (printed record, page 1054).

These two statements show conclusively that the State of West Virginia and her former counsel who prepared and conducted the defense of this suit were fully informed in respect to the data and material which are now set up as "newly discovered" and are relied upon as the basis for re-opening this case.

It thus appears that although the defendant had every opportunity to assert these purported claims, now relied upon as new defences, and to have the same passed on by the court, as she was in duty bound to do if she had intended to rely upon them, they are not mentioned in the original answer filed by the defendant in this cause at the October term, 1907, nor is any intimation given therein of the purpose to assert or rely upon them.

Your respondent is advised, and so states, that even if it had ever been pertinent to inquire into the alleged value of these assets, the period at which such valuation should be made was not January 1, 1861, as is assumed by the defendant, but June 20, 1863, the date of the creation of the new state, and the date as of which this court ascertained the values of property in the two states as the basis for the apportionment of the debt; and your respondent states that there is now no means of showing, even by way of reasonable approximation, the value of said assets in June, 1863.

It is part of the history of those troublous times, confirmed by the testimony taken before the special master in this cause, that all values of property in Confederate Virginia were enormously depreciated in 1863. This was necessarily especially true of railroads and canals, which inevitably shared most largely in the destruction and dilapidation of exhausting and disastrous war.

With no market for their purchase because of the wretched condition of the country, and the darkening outlook for the future, it is not strange that such stocks and bonds as the defendant now seeks to charge against Virginia were on the 20th of June, 1863, so valueless that it would be a vain and unjust thing to seek now to make them a basis for fixing a liability upon Virginia.

The same is true of the banks in Confederate Virginia. Their assets, which in 1861 rested firmly upon a gold or gold and silver basis, had [as was the case throughout the seceded States] been rapidly depreciating, and had shifted from a gold basis to a Confederate basis, and were steadily and rapidly descending towards the worthlessness which characterized them at the close of the war.

Why then should this court at this late day be asked to enter upon a fruitless inquiry into the value of Virginia's securities at a time when she was in the throes of war,—when there was no market value for her securities, and, therefore, no just standard of values? There were in those days no "market quotations" because there was no market. How then shall the values be proven? By the uncertain estimates or "guesses" of aged men as to the probable values of more than fifty years ago? If so, then West Virginia has done Virginia an injustice in having failed through the years of this litigation to set up this defense upon which she now relies, for each passing year leaves fewer and fewer of those whose memory of such facts

reaches back to 1863. For this court now to attempt to ascertain the values of these securities as of June, 1863, would be to enter the futile field of conjecture.

The defendant, in speaking of this period, through her former counsel, said:

> "True Virginia has suffered; she was through four years a battle ground; her people were largely withdrawn from their vocations of business; her agriculture languished, and much of her property was destroyed by contending armies." (Brief of Counsel for West Virginia, vol. 2 W. Va. Compilation, page 115).

Hence the defendant in referring in her answer to her liability for the value of stocks, bonds and credits transferred to her by the "restored government of Virginia" by the act of February 3, 1863, said:

> "And she avers that at the time when such stocks and credits were transferred they were greatly depreciated and were of but little value." (Vol. 2, W. Va. Compilation, page 8).

If the stocks and credits transferred to the defendant by Virginia in 1863 were of "but little value," the same would be true of those retained by Virginia, as the cause which operated to destroy the value of the one would so operate upon the other—with this difference: that the destruction would have been more complete in Virginia, as her soil was a "battle ground."

Among the former counsel for the defendant, and the draftsman of her answer (as your respondent is informed), was the late Wesley Mollohan, a gentleman who stood in

the front rank of the West Virginia Bar and whose brethren of that State have since his death paid generous and glowing tribute to his character and attainments. He was a native of Virginia, and a resident of West Virginia from the time of her formation until his death. No man in Virginia was better informed than he in respect to her history, her resources, investments and the value of such investments during the period of the war or the disposition of them, and the fact that he considered them of "but little value" may be accepted as proof of that fact and as conclusively showing that the delay and expense involved in an inquiry into that subject would not, in his opinion, have been justified from the standpoint of the defendant.

2. The second ground in support of this motion is, that "the evidence of the existence, value and disposition of said assets was in the possession of the State of Virginia, and she did not volunteer the disclosure thereof."

In reply thereto this respondent says, that, as already shown, the knowledge of the existence of said assets had been in possession of the defendant since the report of her commission in 1871, and were further fully and completely disclosed by the "balance sheet" of Virginia, prepared by the defendant's accountants and put in the record by her counsel; in other words, your respondent wishes to emphasize the statement that while the existence of these alleged assets may have been recently "discovered" by the defendant's present attorneys, Virginia possessed no knowledge in respect to said assets that was not also in the possession of or readily accessible to the defendant's former attorneys who conducted this case for and on her behalf.

The proposed amended answer of the defendant appears

to call for an apportionment of alleged assets of the original state as of January 1, 1861, but, as already mentioned, West Virginia was not formed until June 20, 1863, and, of course, could not claim an interest in any such assets until that date, and there could be no charge against Virginia with respect to them, except in accordance with their value as of that date.

The "disposition" of said alleged assets therefore after June 20, 1863, has no relevancy to or bearing upon the issue raised by this motion, as already pointed out. Your respondent repeats that she has no information as to the value of said assets as of June, 1863, which is not equally accessible to West Virginia, nor does there exist, so far as she or her counsel are informed, any proofs or any evidence anywhere which would determine, even approximately, the value of these alleged assets or show that they had any appreciable or ascertainable value in June, 1863, except in the well nigh worthless paper currency of the Confederate States, in which Governor Letcher estimated their value in his message in September, 1863, quoted by the defendant in its proposed supplemental answer.

This respondent, therefore, says, that the statement that she withheld any information touching these matters from the defendant is as gratuitous as it is unwarranted.

3. In response to the third ground assigned, the respondent denies the proposition that diligence cannot be required of a state to "ascertain the evidence governing its rights when in controversy." If this were true, there could never be an end to a controversy to which a State is a party.

To say that because the state may have frequently changed its officers she thereby becomes not affected by

notice duly given to her or knowledge acquired by her through her preceding officers or agents in charge of the matters involved, would result in preventing the state becoming bound by any notice or knowledge which might have been given to or acquired by any officer or agent of the state whose term of authority had expired—a result so manifestly unfair to parties having dealings with the state as not to be tolerated by a court of justice.

4. In response to the fourth ground assigned, respondent says, that if it were true that the decree of reference did not call for a "discovery" of these alleged assets, such omission would furnish no ground for the defendant's motion to reopen this case. But it is not true, as alleged, that the decree of reference did not call for or authorize such discovery. Under the decree of reference the master was directed to ascertain and report upon certain matters referred to him, and was also "at liberty to state any special circumstances he considered of importance, and to state such alternative accounts as may be desired by either of the parties subject to the direction of the court." (W. Va. Compilation, vol. 2, p. 49.)

As already pointed out, the defendant's counsel were fully informed of the existence of these alleged assets, and under this authority it was, of course, not only competent for her counsel, but the duty of her counsel, to have an "alternative account" stated in respect to these assets, if they "desired."

5. In response to the fifth ground assigned, the respondent denies that any such equity exists as therein claimed and asserted.

6. In response to the sixth ground assigned, the respondent says, that if the provisions of her Constitution of 1851 therein referred to had any bearing on the issue now raised, which is denied, they were known to or readily accessible to the defendant's counsel to whom she had intrusted her interests in this suit.

7. In response to the seventh ground assigned, the respondent denies that she collected or received the sum stated therein, or any sum approximating that amount, as dividends upon investments; and further denies that the alleged facts therein referred to, if true, would affect the defendant's liability to pay interest on the principal sum found against her by the decisions of this court. The respondent further answering, at the risk of repetition, says, that any alleged new facts which have any relation to or bearing upon the issue raised by this motion were fully known to the former counsel of the defendant.

It may be noted that the defendant now appears to assert a claim to a share of the public buildings, libraries, etc., remaining in the present State of Virginia—a claim which was denied by her former counsel, who insisted that all public property, such as state institutions, public buildings, charitable and other endowments, state banks, railroads and internal improvements "local to the two states" belonged to said states, respectively, upon the separation. (See Vol. 1, W. Va. Compilation, pages 137-8-9, and Vol. 2, p. 270.)

Your respondent begs leave further, in reply to said motion, to say: That at the meeting between the commissions representing the respective states held July 25, 1913, the Virginia Commission declined the demand of the West Virginia Commission to reopen this case and enter upon a consideration *de novo* of all questions involved, for the reason, as then pointed out, that the court by its decision

of March 6, 1911 (reaffirmed by its decision of October 30, 1911,) had fixed the amount of the defendant's share of the principal of said debt, except for clerical errors, and had referred to the two states for adjustment any mere clerical errors which might be shown in the principal sum so fixed, and what, if any, interest and the rate thereof said sum so fixed should bear. This decision was again reaffirmed by the court in its decision rendered on November 13, 1913, wherein the court said:

> "In March, 1911, (*Virginia* v. *West Virginia*, 220 U. S. 1) our decision was given 'with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed.' In view, however, of the nature of the controversy, of the consideration due the respective states, and the hope that by agreement between them further judicial action might be unnecessary we postponed proceeding to a final decree and left open the question of what, if any interest was due and the rate thereof, as well as the right to suggest any mere clerical error which it was deemed might have been committed in fixing the sum found to be due upon the basis of liability which was settled."

These decisions of the court, while not so in form, nevertheless virtually constitute a decree of the court. They fixed in plain language the "share of the principal of the debt of Virginia that West Virginia assumed." If West Virginia was dissatisfied with this decision on any ground, your respondent is advised that her remedy was to apply immediately for a rehearing. This the defendant did not do; and now, after the case has been before the court for eight years, and three years have elapsed since the decision

was rendered fixing her liability for her "share of the principal of the debt of Virginia," she appears and moves the court to be allowed to contest that decision on new grounds set up in a supplemental answer—and that notwithstanding these alleged new facts were well known to and considered by her accountants and counsel, as shown by the record.

To grant this motion, your respondent respectfully submits, would involve a heavy burden of expense, and indefinitely postpone a final determination of this controversy, and subject your respondent to great injury. No injustice has been done the defendant. Every possible consideration and indulgence has been shown her, and her defense has been industriously and thoroughly prepared and fully and ably presented many times before the master and the court, in the light of and with full knowledge of the facts now alleged to have been "just discovered." To grant this motion at this late day and under the circumstances stated would, it is respectfully submitted, defeat and not subserve the ends of justice.

Your respondent has paid and assumed to pay, as shown by the record, more than seventy million dollars on account of her share of the debt created before her dismemberment, and she ventures respectfully to assert that West Virginia's proposal to fix her own share of the debt at $2,300,000, without interest, after this court had fixed her share of the principal at $7,183,507.46, could not have been submitted with the expectation that it would receive consideration or furnish the basis for an adjustment of this controversy.

All the data is before the court which will enable it to determine the question of interest and the rate thereof, as well as the views of your respondent's counsel on that subject.

In view, therefore, of the foregoing considerations, it is

respectfully submitted that the motion of the defendant should be denied and that the cause be finally heard on the 13th of April next, as provided in the order of this court entered November 10, 1913.

And it is further submitted that in the light of all the circumstances, and in order to bring this litigation to a close, the court will allow such rate of interest on the principal sum fixed and for such period of time as in its judgment will meet the ends of justice.

All of which is respectfully submitted.

COMMONWEALTH OF VIRGINIA,
By JNO. GARLAND POLLARD,
Attorney-General.

JOHN B. MOON,
W. A. ANDERSON,
RANDOLPH HARRISON,
Of Counsel.

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BRIEF FOR COMPLAINANT UPON FINAL HEARING SET DOWN FOR APRIL 13, 1914.

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The counsel for Virginia beg leave to present in a compact form, convenient for the consideration of the court, the arguments in support of the right of the commonwealth to be paid, and of the obligation of West Virginia to pay interest upon such portion of the Virginia debt, as the new state has assumed, which arguments are chiefly collated from the briefs and oral arguments heretofore submitted on behalf of the complainant.

I.

THE LIABILITY OF WEST VIRGINIA FOR INTEREST.

Is West Virginia justly, legally, equitably and contractually chargeable with interest?

In this connection, we must remember that the contract we are considering was a Virginia contract. At all events it was a contract made by Virginians, or by Virginians and West Virginians, with reference to Virginia, or with reference to Virginia and West Virginia, and presumably also with reference to the principles of equity and of right which, for generations before the formation of West Virginia, had been an integral part of the body of the law of the commonwealth, and *eo instanti* with its birth, became a very part of the body of the law of the new state, and of every contract made within the jurisdiction thereof.

Under the law of Virginia as repeatedly adjudicated by her highest court, the interest is incident to the obligation, and whenever a debt is due, the debtor is bound to pay interest unless relieved from this obligation by agreement. This is, and has been the law of the commonwealth for more than one hundred years.

In *Jones* v. *Williams*, 2 Call 106, decided in 1799, Edmund Pendleton, who was one of the great judges of our country, delivering the opinion of the court said:

> "Interest is allowed because it is natural justice that he who has the use of another's money should pay interest for it." Cited with approval in *Baker* v. *Morris*, 10 Leigh 284, *McVeigh* v. *Howard*, 87 Va. 599 and *Stuart* v. *Hurt*, 88 Va. 343.

In *Hatcher* v. *Lewis*, 4 Randolph 152, 157, the court laid down the rule in the following expressive language:

"The interest follows the principal as the shadow does the substance."

In *Chapman* v. *Shepherd*, the court said:

> "In contracts for the payment of money, interest is not given as damages at the discretion of the court, or jury, but as an incident to the debt, which the court has no discretion to refuse."
>
> *Chapman* v. *Shepherd*, 24 Gratt. 377, 384;
>
> *Roberts* v. *Cocke*, 28 Gratt. 207;
>
> *Tidball* v. *Shenandoah National Bank*, 100 Va. 741.

> "Interest is favored both by the legislative and judicial bodies of the state."
>
> *Tazewell* v. *Saunders*, 13 Gratt. 354, 370.

In *McVeigh* v. *Howard*, 87 Va. 599, the Supreme Court of Appeals of Virginia said:

> "It is the settled rule that when no day is named in the bond or note given for the payment of a precedent debt, it is due and payable on the day of its date, and bears interest from that date, though no interest be reserved. Such an instrument like a bond or note payable, in Virginia, on demand, is payable presently, and bears interest from date. This doctrine is founded in good conscience and correct morals." * * *
>
> Citing *Jones* v. *Williams* and *Hatcher* v. *Lewis*, quoted above.

Such is the law of Virginia as to interest.

The law of West Virginia in regard thereto is the same.

In *Shipman* v. *Bailey*, 20 W. Va. 140, 146, Judge Snyder, announcing the unanimous opinion of the Supreme Court of Appeals of that State, after citing a number of authorities upon the question, stated the rule as follows:

> "Other authorities of the same character might be cited, but, we think, we have given sufficient to establish the rule which seems to be, that in contracts for the payment of money interest on the principal sum is a legal incident of the debt and a part of the contract, and wherever there is a contract for the payment of a specified legal rate of interest, whether such rate is fixed by the contract itself or by the law of the place where the contract is made, the obligation of the contract extends to the payment of such interest as fully as it does to the principal sum, and courts have no more power to change the rate of interest thus fixed, than they have to dispense with the enforcement of the contract either in whole or in part."

That decision reaffirms another proposition, applicable to this case, already a part of the jurisprudence of West Virginia, by the adjudications of the Supreme Court of Virginia rendered before the birth of the new state, namely, that the *lex loci contractus* controls in the matter of the interest chargeable against a debtor.

In *Pickins* v. *McCoy*, 24 West Va. 344-352, the court affirms *Shipman* v. *Bailey*, and adopts the language just quoted from that decision.

Independently of these West Virginia decisions, such parts of the common law and of the laws of the State of

Virginia as were in force on the 20th of June, 1863, when the first Constitution of West Virginia went into operation, and as are not repugnant to said Constitution, were continued and declared to be the law of West Virginia. Section 8 of Article XI, of the first West Virginia Constitution. And see present West Virginia Constitution.

The effect of this provision was to adopt for the new state the body of the common and statute laws of the commonwealth, so far as the same were in force within the boundaries of the new state on the 20th of June, 1863.

As a part of this body of laws, the law of Virginia as to interest became, and has continued to be, a part of the laws of West Virginia.

Such, then, was the law of Virginia before, at the time of, and since the formation of West Virginia, as to the legal and equitable liability of a debtor or contractor to pay interest. Such has been the law of West Virginia since the hour of her birth. And such was, and is, the law of the contract evidenced by the public acts of Virginia and West Virginia set forth in complainant's bill.

This is the rule in Virginia as to debts due by the Commonwealth.

The question was presented in the celebrated case of *Higginbotham's Executrix* v. *Commonwealth*, 25 Gratt. 627.

That was a suit against the commonwealth to recover the amount due Higginbotham's Executrix on certain past due dividends on stocks which had been guaranteed and assumed by Virginia by the acts cited in the opinion of the court—26 Gratt. 630, 631.

There was no express contract by the state to pay interest upon said dividends. The petitioner's claim was for the amount of the dividends "with its accruing interest."

The unanimous decision of the Supreme Court of Virginia was that "judgment should be entered for the peti-

tioner for the amount of her demand with interest."—Idem, p. 641.

The framers of the Wheeling ordinance must be presumed to have drawn that instrument with reference to the principle of equity and justice which had then, and long before that time, been embodied in the laws of Virginia by the repeated decisions of her highest court.

To Virginia and West Virginia lawyers of that day, as since that time, Judge Coalter's apt formula that, "the interest follows the principal as the shadow does the substance," was as familiar as any other accepted rule of equity or of law.

Under the law of Virginia in force at the time of these transactions, interest upon the portion of the debt which West Virginia was to take upon herself, was an essential incident of the debt, and its payment as much a part of the obligation as was the payment of the principal.

But, even if the *lex loci contractus* had not brought us to this conclusion, the language of the ordinance itself, fairly construed, leads to the same result.

That language is that:

> "The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861," etc.

Now, that debt was an interest bearing debt. It was represented by obligations of the undivided state, some of them payable at a future day, some of them at a future day and thereafter at the pleasure of the commonwealth, but all of them interest bearing obligations, obligations in which the payment of the stipulated interest was made as much a part of the debt as was the payment of the principal.

The interest was an integral part of the debt, and as

many of the bonds were payable thirty-four years after date, and over $10,000,000 of them at the pleasure of Virginia, with interest from date, the interest as to much of the debt constituted much the greater part of it.

It was the manifest intention of the enactors of that ordinance, unless we are to ascribe to them the sinister purpose of perpetrating flagrant wrong and injustice, that the new state should take upon itself, and relieve what remained of the old state of a part of the burden of debt which rested upon both states. They knew that that burden consisted as well of interest, as principal, and as much, of interest as of principal.

It was not proposed that the new state should, as soon as she became a state, pay in cash a sum to be ascertained in the manner indicated in the ordinance. The framers of the ordinance understood too well that under the conditions then existing, it would be impossible for the new state to raise and pay any considerable sum in cash.

Why, the new state was dependent upon the old state for the money necessary to enable her to begin business, and she did not have, and in the nature of things could not command, a sufficient amount in cash to pay off one-tenth or even one-twentieth of the then Virginia debt.

The stipulation was not that the new state should pay a sum in cash on account of its share of a common indebtedness; but that it should take upon itself a just proportion of that debt, to be ascertained as in the ordinance prescribed.

Are we to understand that a court of conscience is to be asked to construe that stipulation to mean that the new state shall take upon itself only a proportion of a part of that debt? That it shall assume a share of the principal only of the debt, but shall be exonerated from any part of the interest which was, and is, as integral a part of the Virginia debt, and of the obligations which represent it,

as the branches are a part of the tree from whose trunk they spring?

In their elaborate arguments in this case, opposing counsel have heretofore devoted very little attention to this important question, although their attention was challenged to it by the argument for Virginia. In so far as they have discussed it, they have ignored the facts and principles upon which West Virginia's legal, "equitable," and "just" obligation to assume and pay the interest as well as the principal of her share of the debt, rests.

But West Virginia's equitable and legal liability to pay interest upon her share of the debt of Virginia does not at all depend alone upon the Wheeling ordinance, or upon the law of Virginia and West Virginia, which makes the interest an essential part of the debt; but it rests still more and beyond the possibility of question upon the express terms of the Constitution under which West Virginia became a state.

The fact, the character, and the legal effect, of the compact created by that important transaction have already been fully discussed.

West Virginia's solemn covenant in regard to the equitable proportion of that debt which she assumed was that her legislature should "provide for the liquidation thereof by a sinking fund, sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This was precisely in accordance with the plan which had long theretofore been adopted by the commonwealth for the payment of her debt.

This plan was embodied not only in the statutes but also in the Constitution of Virginia, in force when West Virginia became a state.

It was embodied in that constitution in the following terms:

"29. There shall be set apart annually, from the accruing revenues, a sum equal to seven per cent. of the state debt existing on the first day of January in the year one thousand eight hundred and fifty-two. The fund thus set apart shall be called the sinking fund, and shall be applied to the payment of the interest of the state debt, and the principal of such part as may be redeemable. If no part be redeemable, then the residue of the sinking fund, after the payment of such interest, shall be invested in the bonds or certificates of debt of this commonwealth, or of the United States, or of some of the States of this Union, and applied to the payment of the state debt as it shall become redeemable. Whenever, after the first day of January, a debt shall be contracted by the commonwealth, there shall be set apart in like manner, annually, for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction; which sum shall be part of the sinking fund, and shall be applied in the manner before directed. The General Assembly shall not otherwise appropriate any part of the sinking fund or its accruing interest, except in time of war, insurrection or invasion."

Section 29 of the Constitution of Virginia, in force from January 1, 1852, Code of Virginia for 1860, p. 47; Appendix to the Record in this suit, p. 200.

It was expressed and given further effect by the second section of the following act passed by the General Assembly of Virginia:

"Chap. 17. An act establishing a sinking fund and providing for the payment of the semi-annual in-

terest on and redemption of the public debt. Passed March 26, 1853.

"2. Whenever after the said first day of January, eighteen hundred and fifty-two, a debt shall be contracted by the commonwealth, there shall be set apart, in like manner, annually for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction, which sum shall be part of the sinking fund, and shall be applied in the manner hereinbefore directed."

Acts of General Assembly of Virginia, session of 1852-3, p. 29; Appendix to the Record, pp. 200, 201.

Its effect was, therefore, well understood to be to conform the undertaking of West Virginia in regard to the time and manner of the payment of her share of the debt to the plan and scheme of payment which had been adopted by the commonwealth, and which experience had approved.

That scheme was, the creation from the annual revenues of the state, of a fund equivalent to seven per centum of the principal of the debt. Of this, six per centum went to pay the annually accruing interest, and one per centum was invested and set apart to retire the principal sum due, within thirty-four years, and this arrangement was defined as a sinking fund.

It was found, and if the calculation is made it will be shown to be true, that one *per centum* of any sum invested and compounded at six *per centum* interest per annum, will in thirty-four years produce an amount equal to such sum.

This was the theory and the plan which Virginia had adopted for the liquidation of her debt.

It was a plan which Messrs. Willey, Van Winkle, Hall, Brown, Haymond and other members of the first West Vir-

ginia Convention, who had been previously members and some of them able members of the General Assembly of Virginia, were doubtless entirely familiar: And it is the same plan which we find incorporated in the scheme of settlement which constitutes a part of the foundation upon which West Virginia's existence as a state rests.

By this clause of West Virginia's Constitution, therefore, it was required, not that the new state should pay a lump sum in cash, to be ascertained in the manner prescribed, but that she should *assume* "an equitable proportion of the public debt of the commonwealth" existing on the 31st of December, 1860, and should "provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

The framers of the West Virginia Constitution thus manifestly adopted, and engrafted upon that instrument, the plan which for nine years or more had been a part of the organic and statutory law of Virginia for the extinguishment of her public debt, and the legislature of Virginia accepted and approved that plan.

That plan included, (as the West Virginia Constitution also expressly included), an undertaking on the part of the state to pay the accruing interest, and to liquidate or redeem the principal of each bond representing the debt, within thirty-four years.

In simple language, the stipulation of West Virginia expressed in her Constitution, and accepted and acted upon by Virginia, was, that West Virginia would pay the accruing interest on her share of the debt, as it should accrue, and the principal thereof within thirty-four years.

That such was her express undertaking, appears from the language of her first Constitution, interpreted according to the reasonable and natural meaning of that language.

That such was the purpose, meaning, and effect of that language, is conclusively shown when we read it in the light

of the plan established by the Constitution and statute of Virginia, then in force, for the establishment of a sinking fund for the liquidation of her public debt, which plan was adopted by the new state as to its share of that debt.

And so, we find that both by the express terms of the Wheeling ordinance fairly construed, and by the epxress terms of the Constitution under which Virginia and the National Congress consented that West Virginia should become a state, this new state has become expressly obligated to pay interest upon the share of the principal of the common public debt for which she is liable.

These positions are not at all in conflict with the general rule of American and of public law, as clearly defined by this court in *United States* v. *North Carolina*, 136 U. S. 211, as the law governing that case, that,

> 1. "Interest, when not stipulated by contract or authorized by statute, is allowed by the courts as damages for the detention of money or property;"
>
> 2. "Interest is not to be awarded against a sovereign unless its consent has been manifested by an act of its legislature, or by a lawful contract between executive officers;"
>
> 3. "By decisions in North Carolina that state, unless by or pursuant to an explicit statute is not liable for interest, even on a sum certain which is overdue and unpaid."
>
> See, also, *South Dakota* v. *North Carolina*, 192 U. S. 286.

The question presented in the case at bar is taken out of the reason and the decision of this court in the North Carolina cases by the following circumstances:

(1) The obligation to pay interest is determined by the *lex loci contractus*, and under the settled law of Virginia

which was the law of the contract between West Virginia and Virginia, and under the law of West Virginia also, interest is not and never has been allowed as damages for the detention of money, but in those jurisdictions interest is allowed as an essential incident of a contract, whether express or implied, for the payment of money, and as a matter of right and justice.

This court, in its opinion in *United States* v. *North Carolina*, expressly rested that decision upon the fact that under the law of North Carolina no interest was payable on such a contract.

(2) The payment of interest is here an obligation imposed by statute—first by the Wheeling ordinance, and second by the constitution under which West Virginia became a state.

(3) The express contract of West Virginia upon which her existence as a state was conditioned requires her to pay interest on the part of the debt which she assumed.

This is a very much stronger case for a decree for interest than *United States* v. *State of New York*, 160 U. S. 600, righteous as was the allowance of interest there.

Paraphrasing the language of this court in that case, p. 621, "It would be a reflection upon the" honorable motives of the members of the conventions which framed the Wheeling ordinance and the West Virginia Constitution "if we did not place a liberal interpretation upon those acts and give effect to what, we are not permitted to doubt, was intended by their passage."

Another question which arises in connection with the consideration of this subject, is, from what time is West Virginia justly and equitably bound to pay that interest?

Answer to this is furnished by the Wheeling ordinance and by the section of the first West Virginia Constitution above quoted.

The settlement by the terms of both instruments was to be made as of the arbitrary date of January 1, 1861, or to be precisely accurate, as of December 31, 1860. That, accordingly, is the date from which fairly, equitably, and legally, (because it accords with the express terms of both the ordinance and the Constitution), the interest should be computed.

As already shown, the debt, a proportion of which as of that date, West Virginia was to assume and pay, was an interest bearing debt, and the interest was as integral a part of it as was the principal.

A further kindred inquiry to the last is: To what time should West Virginia be required to pay such interest?

Our response to this is, that she is justly, equitably and legally bound to pay this interest.

(1) *By the terms of the Wheeling ordinance;* certainly, for the period during which the debt of the commonwealth existing on the 31st of December, 1860, would continue to be an interest bearing debt: And we have seen that that was not only until the obligations representing the debt became due, but under the just rule of the law of Virginia as to interest, in force during the whole period of the creation of the debt, until that principal should be fully paid.

(2) By the terms of the section of her Constitution above quoted, accepted by Virginia and by the Congress, West Virginia undertook to pay *all the accruing* interest on, and the principal of, her share of that debt in thirty-four years.

She has failed and refused to pay that share, or any part of it.

The interest accruing thereon from December 31, 1860, has continued to accrue, as to her, until it now amounts to vastly more than the principal. It was that interest which West Virginia agreed to pay, and it was that principal for the payment of which West Virginia legisla-

ture was to make provision, so that the same should be paid within thirty-four years.

We do not deem it necessary to argue in a court of equity that West Virginia is bound by that stipulation of her Constitution to pay all the thereafter accruing interest upon the portion of the principal of the debt which she thereby undertook to pay, and that her undertaking to pay the accruing interest thereon was not limited to thirty-four years; it cannot be that a state, any more than an individual, will be allowed to ignore her own solemn engagements or profit by her own procrastination and neglect of duty.

Here, West Virginia has not only not paid a just, or any other proportion of the common public debt, nor provided for the payment of the accruing interest thereon, and for the payment of the principal, but she has persistently failed and refused to do either of these things, and has by the votes of her legislature, again and again repudiated any and all liability whatever for any part of that indebtedness.

(See Resolutions of Legislature of West Virginia, App. to Record 247, 248.)

With all deference for the distinguished counsel for the defendant, we venture to believe that a court of equity will not allow any defendant, and particularly a state, which should be an exemplar of fair and honorable dealing in all of its transactions, to make gain out of its own palpable dereliction of duty.

And so, our response to such contention, if it shall be urged, is, that equity will not suffer any party to take advantage of his own wrong.

There is another equity which strengthens Virginia's claim to receive, and West Virginia's obligation to pay, *and to pay with interest*, whatever portion of this common debt, she assumed to pay.

Virginia, as now constituted after January 1, 1861, and before July 1, 1871, on which date (July 1, 1871) she as-

sumed two-thirds of the then unpaid Virginia debt, paid several millions of dollars of the accrued interest, as well as several millions of dollars of the principal of that debt.

It has been repeatedly asserted, in this cause that Virginia, after her dismemberment, assumed only two-thirds of that debt, but the fact is she did this and more.

It is true that by the Funding Act of March 30, 1871, (Printed Record, pp. 17-21, 1 West Virginia Compilation 14-17) she undertook to assume two-thirds of the whole of the existing debt of the undivided state, principal and accrued and *capitalized* interest to July 1, 1871; but that act, and the settlement for which it provided, left out of the account the millions of interest and principal which she had paid off during the preceding ten years, out of the meager resources of an impoverished people.

A very large amount of the money so paid by Virginia during that decade was paid in discharge of obligations for interest. As long and as far as she was able, she paid to the common creditors the interest which was due them; and she also, from time to time during the same period, paid them large amounts in satisfaction of the principal of a great number of their bonds.

These payments by the State of Virginia since January 1, 1861, in satisfaction of specific obligations for interest and for principal, for which West Virginia was ratably bound, give her a right to have contribution from West Virginia. Particularly do the large sums which Virginia paid upon obligations for interest on that common debt, give her a just claim to look to West Virginia to pay her back West Virginia's share of that interest.

It is difficult to conceive how, as a matter of conscience, a state any more than an individual, could avoid or evade such an obligation, for it should be at least equally incumbent upon a state as upon an individual, to be honest.

Most of these payments of interest and principal made by Virginia between January 1, 1861 and July 1, 1871, though by no means all of them, will be found set forth in the official statement or schedule, part of Exhibit No. 3, filed with the bill, being the act of the General Assembly of Virginia of February 14, 1882. (See printed record of suit, pp. 27-32).

That schedule shows that Virginia actually paid on account of the interest on bonds held by the general public $3,662,434.55, between January 1, 1861 and July 1, 1863, and the additional sum on the same account of $3,594,289.11 between July 1, 1863 and July 1, 1871, making $7,266,-723.66, which Virginia paid in discharge of interest accruing during that period, for which West Virginia was bound ratably with her, and of which West Virginia's share would have been, according to the decision of this court, (23½ per cent.) twenty-three and one-half per cent. of the sums so paid.

The same public record shows that during the same period, and before any funding of the share of the debt assumed by Virginia, she redeemed of the common debt, evidenced by dollar bonds, paid off and taken up by her, $3,710,-449.67. (Record, pp. 27-32, 1 West Virginia Compilation, 23-26).

Summarized, the following payments were made upon the undivided common debt in the period mentioned as shown by the act of March 14, 1882, besides other sums not therein mentioned.

Paid on account of interest from January 1, 1861 to July 1, 1871	$ 7,266.723.66
Dollar bonds redeemed and paid in full	3,710,449.67
Total sums so paid	$10,977,173.33

These, and other large sums not brought into that statement, all portions of the common debt of the commonwealth due prior to January 1, 1861, were paid off by Virginia between July 1, 1861 and July 1, 1871, *in excess of the two-thirds of the debt, interest and principal, as of said last named date, assumed by Virginia under the Funding Act of 1871.* To the extent that substantive obligations of the undivided state were thus paid off by Virginia, she clearly has a claim, both for interest and principal paid, to the extent of West Virginia's ratable liability therefor.

At the proper time Virginia will be prepared to show her precise interest in her own right in the recovery in this suit.

II.

AS TO THE SUGGESTION OF "LACHES."

The belated attempt to assert "laches" as a defence against Virginia is without merit.

It is based upon the singular assumption that Virginia is to blame because she exhausted friendly negotiation before bringing her suit, and did not institute it until after her repeated overtures to West Virginia for an amicable adjustment had all been successively rejected.

Like other defences, unless disclosed by the bill, the defence of "laches" must be asserted in the answer or other defensive pleading.

Here it has never been set up by the answer, or other pleading, and is negatived by the allegations of the bill. It will not be allowed to be set up by amendment of answer long after the filing of same: or after the reference to a master and the filing of his report.

Dixon v. *Dixon*, 1 Md. Ch. 171;

Thornton v. *Hantze*, 91 Ill. 199;

Webb v. *Fuller*, 83 Me. 405, 22 Atl. 384;

See, also, 16 Cyc. 176 and 177 and citations.

We ask leave, however, to briefly consider this defence as presented in defendant's brief, because of its relation to other equitable features of the cause.

The defence of "laches," in equity, is only permitted to defeat an acknowledged right on one or both of the following grounds:

(1) That it raises the presumption that the claim has been abandoned or satisfied.

(2) That the party pleading it has been seriously prejudiced by the culpable failure of the plaintiff to assert his claim.

Demuth v. *Old Town Bank*, 85 Md. 315, 37 Atl. 260, 268.
Coles v. *Ballard*, 78 Va. 139, 147;
Wisler v. *Craig's Adm'r*, 80 Va. 22, 30;
Cottrell v. *Watkins*, 89 Va. 101, 19 L. R. A. 754;
Johnson v. *Atlantic Gulf & West India Transit Co.*, 156 U. S. 618, 648;
Selbag v. *Abistbal*, 4 Maule & S. 462;
Morse v. *Seibold*, 147 Ill. 318, 35 N. E. 369, 371;
Hall v. *Otterson*, 52 N. J. Equity 522.

Not one of the grounds upon which such a defence must rest as shown by the authorities exist here.

(a) Any presumption of satisfaction of her share of the debt by West Virginia or of abandonment of her claim is absolutely rebutted by the proof that the new state has never paid, and has failed and refused to pay, a dollar on account of the Virginia debt, and that Virginia has persistently urged a settlement.

(b) Nor is there any evidence in the case showing, or tending to show that West Virginia has suffered prejudice from Virginia's forbearance to sue.

No evidence helpful to her has been lost. *The substantial proofs of the debt and of West Virginia's liability for it, are all matters of irrefutable record*, all of which have been se-

curely kept and preserved with wonderful accuracy and fidelity, so that the absolute verity of every item of the account and every entry upon those voluminous records, covering the transactions of forty years, has compelled the candid assent of the accountants and the counsel for West Virginia.

On the contrary West Virginia has profited enormously by her long delay in making a settlement with Virginia.

While Virginia has been struggling for half a century to meet her just obligations on account of this common debt, and has paid and assumed at least $78,000,000 on account of it as of the present year, a considerable part of her payments having been made years ago, during the period of the greatest poverty of her people, West Virginia, husbanding her resources, and *compounding* her wealth, has not paid one cent.

Instead of her position and ability to pay having been impaired by this long delayed settlement, for the postponement of which she is largely responsible, she has profited so greatly by it, that her taxable resources have increased from a total assessed valuation of $126,060,743 in 1867 to $937,-232,718.54 in 1908, an enhancement of 643 per cent. See Plaintiff's Exhibit E-3, R. 651.

It appears from this same authentic exhibit that the taxable resources of Virginia increased during the same period from $354,848,482.69 to $661,796,631, or only about 84 per cent.

That comparative schedule of taxable resources, fairly interpreted, demonstrates another thing, namely, that instead of being prejudiced by this lapse of time, West Virginia could, in her present prosperity and affluence—largely the result of the development of her territory by lines of railway which had their inception in the works which represent millions of dollars of Virginia's debt, pay twenty million dollars today, with less inconvenience and less

burden upon her people, than she could have paid two million dollars in 1867.

Moreover, the defense of laches cannot be interposed against a state. In *Armstrong* v. *The Morrill*, 14 Wal. 144-5, the court citing *Stoughton* v. *Baker*, 4 Mass. 526, holds that no laches can be imputed to the government and that time does not run against a state.

In *Metropolitan R.* v. *Dist. of Columbia*, 132 U. S. 11, the court through Mr. Justice Bradley says: "No restrictive laws apply to the sovereign unless so expressed. And especially no laws affecting a right on the ground of neglect or laches, because neglect or laches cannot be imputed to him. And it matters not whether the sovereign be an individual monarch, or a republic, or a state. The principles applies to all sovereigns. The reason usually assigned for this prerogative is that the sovereign is not answerable for the delinquencies of his agents. But whatever the true reason may be such is the general law—such is the universal law, except where it is expressly waived." See, also, *Wever* v. *Commissioners*, 18 Wal. 70. In *Gibson* v. *Chouteau*, 13 Wal. 99; *Lindsay* v. *Miller*, 6 Peters 673; *United States* v. *Knight*, 14 Peters 315; *United States* v. *Thompson*, 98 U. S. 489; *Gaussen* v. *United States*, 97 U. S. 584; *United States* v. *Nashville, &c. Ry.*, 118 U. S. 125, *supra*.

In *Bannock County* v. *Bell*, 101 American State Reports, 152-3, Note 2, it is stated as the universal rule that statutes of limitation should not run against a state nor can laches be imputed to it, although private parties may be interested along with the state in the matter sued on. See authorities there cited.

In the opinion of the court on the demurrer in this cause (V. 1, p. 433 of West Virginia Compilation) the lapse of time is referred to, but the demurrer is overruled and an order afterwards entered for an accounting upon the de-

fendant's answer which in no manner refers to the matter.

All of the known circumstances of this case combine to utterly preclude the doctrine of *"laches"* from applying to it, or being recognized as a just or an equitable defence against the right of the complainant to recover from West Virginia, the portion of the debt which West Virginia assumed *with the interest accruing thereon* from the date when West Virginia became so obligated to pay, until both the principal and the interest thereon shall be paid.

CONCLUSION.

It is, true that the amount which West Virginia is equitably bound to pay, including the interest fairly and justly due thereon, will, as of this date, aggregate a very large sum; but that constitutes no argument for her exoneration from the payment of the same.

Fortunately for West Virginia this indebtedness, in view of the affluence which the record shows she now enjoys, largely resulting from the expenditures made by Virginia in roads, turnpikes, railroads and bridges, and in the improvement of the navigation of her rivers will impose upon her a burden easy to be borne, and light, as compared with what Virginia, during the period of her greatest impoverishment has assumed and borne.

Virginia has paid, as of this date, over $40,000,000 of interest since January 1, 1861; and these payments, made by her, have been distributed through a period of more than forty-five years.

If interest were to be computed upon the payments thus made by Virginia during the last fifty years on account of this common debt—which would have to be done in order to equalize West Virginia with Virginia in regard to these transactions—the average period upon which interest should be so computed upon the payments so made by Virginia in

order to thus equalize her with West Virginia, would be considerably more than twenty-five years; and the amount assumed and paid by Virginia, including the upwards of $25,000,000 of her recognized and regularly met obligations still outstanding, and including the payments she has heretofore made on the whole debt, and on the two-thirds she has specifically assumed, would aggregate considerably over $100,000,000, as of this date.

What is of equal significance, the entire debt was hypothecated, not on such values as existed at its creation, or on June 20, 1863, but upon future and prospective values, which it was confidently expected the expenditure of the money borrowed would evolve. Realizing the difficulties in the way of the application of a rule which would have done exact justice by apportioning the burden and resting it upon prospective values in the two states, (a rule sanctioned by the highest authorities, Moore's Digest Int. Law, p. 334; *Hartman* v. *Greenhow*, 102 U. S. 672, 677; *Antoni* v. *Greenhow*, 107 U. S. 769) the court felt constrained, after mature consideration, to apportion the debt between the two states according to values of property therein on June 20, 1863.

This circumstance however is but an added proof that West Virginia will have no just ground of complaint against a decree which will require her to pay much less than the share of the debt which she would have to bear, if it was made to rest on the future and prospective values on which it was really hypothecated, and which constituted the chief inducement and consideration for its creation.

The people of West Virginia are today enjoying the fruits of the enterprise and liberality of the commonwealth in those expenditures,—not only those expended within the limits of West Virginia, but also in the expenditure of millions of dollars on works outside of the territorial limits of West Virginia, but which were built in large part for

the purpose of developing the resources of the territory now constituting that state.

Nor can it be forgotten that almost the entire indebtedness which is the subject matter of this investigation was created by the votes of the representatives of West Virginia, and that very little of it ever would have been created but for the support they gave to the acts by which this large indebtedness was imposed upon the commonwealth.

Too much emphasis cannot be laid upon the foregoing facts and considerations.

The complainant only desires and asks that a decree shall be entered which is in accordance with the legal and equitable rights and obligations of the parties as heretofore determined by the court, and which will require West Virginia to pay interest upon the principal sum due by her from the date when she assumed that liability until the principal sum shall be fully paid, at such rate as the court shall consider just and equitable under all the circumstances of the case.

Such a decree will impose upon the new state the duty of paying a large sum on account of this long ignored obligation, but a sum, every dollar of which West Virginia justly owes and the complainant is justly entitled to recover, for those who have entrusted their interests to her keeping, and in her own behalf.

Respectfully submitted,

JNO. GARLAND POLLARD,
Attorney-General of Virginia.

WILLIAM A. ANDERSON,
JOHN B. MOON,
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Associate Counsel for Virginia.

FILED
MAR 1 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1914—No. 2, Original.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

Exceptions of the Bondholding Creditors of the Commonwealth of Virginia to Report of the Special Master, Dated January 21, 1915.

HOLMES CONRAD,
Attorney for the Bondholding Creditors of the Commonwealth of Virginia.

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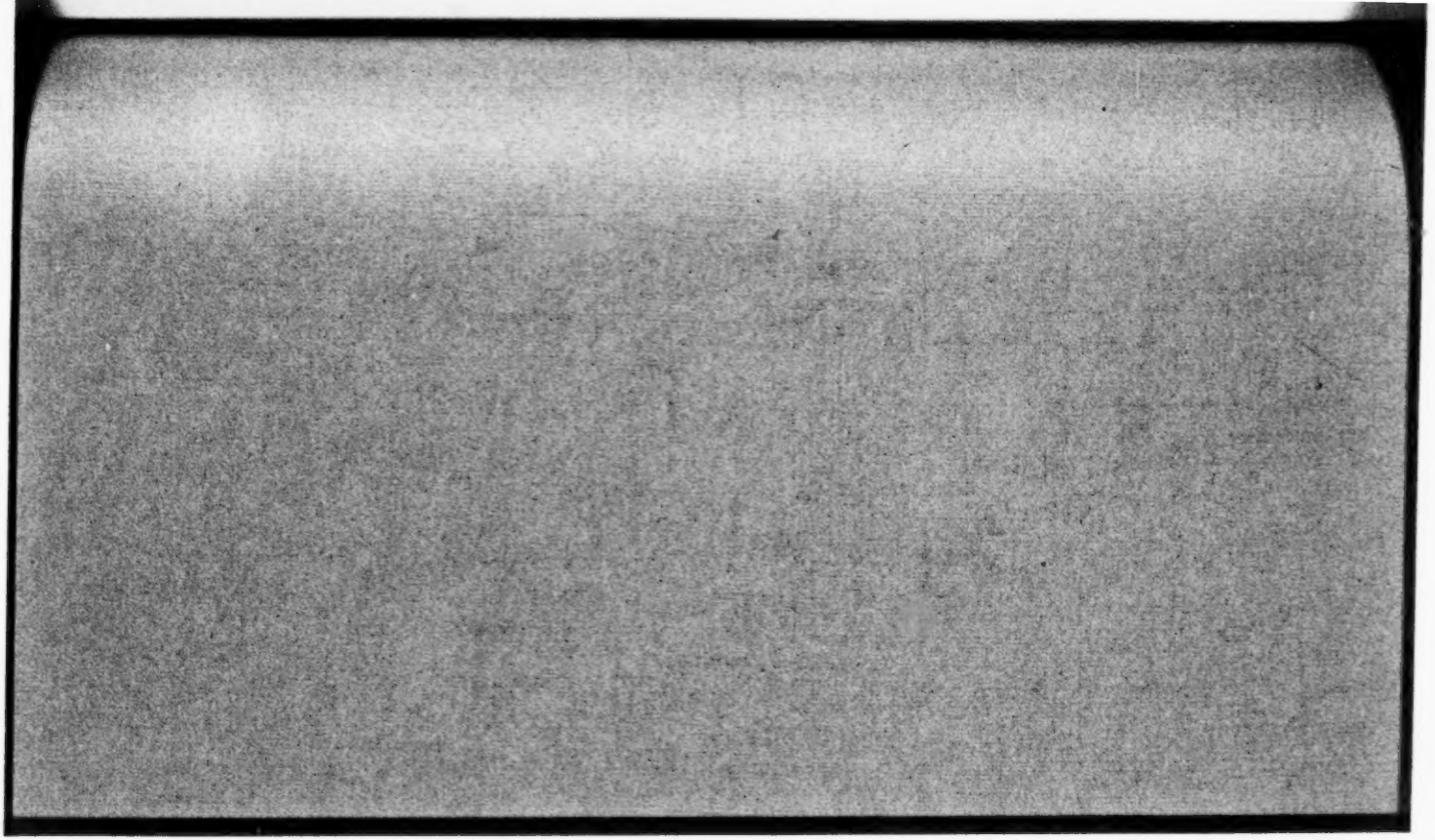

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Exceptions of the Bondholding Creditors of the Commonwealth of Virginia to Report of the Special Master, Dated January 21, 1915.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners, the Bondholding Creditors of the Commonwealth of Virginia, by Holmes Conrad, their attorney, humbly pray leave to file the annexed exceptions to the report of the Honorable Charles E. Littlefield, Special Master, in the above cause, which report was filed in this court on the 22nd day of January, 1915.

And as in duty bound your petitioner will ever pray.

BONDHOLDING CREDITORS OF VIRGINIA,
By Holmes Conrad,
Their Attorney.

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1914.

No. 2 Original.

COMMONWEALTH OF VIRGINIA,
Complainant,
vs.
STATE OF WEST VIRGINIA,
Defendant.

Exceptions of the Bondholding Creditors of the Commonwealth of Virginia to Report of the Special Master, Dated January 21, 1915.

For errors of law apparent in the record, the Bondholding Creditors of Virginia respectfully except to the conclusions, findings and allowances contained in the Master's Report, as hereinafter set out and specified.

I. FIRST EXCEPTION.

The Bondholding Creditors of Virginia respectfully except to the conclusion that the assets are to be valued as of January 1, 1861, as contained in paragraph SECOND, at page 10 of the Master's Report, as follows:

> "The only right that West Virginia acquired as to these assets or investments, as against Virginia, was the right to require Virginia, on the date agreed upon, to apply the assets or in-

vestments, at their fair value at the time agreed upon, towards the liquidation of her own debt; so that West Virginia could know, when the assets were so applied, the amount of the real debt remaining to which she would be obliged to contribute. It was perfectly competent for the two States to agree upon any date upon which the debt and the value of the assets and the investments, and the difference between the two, could be ascertained. West Virginia's rights do not depend upon any title that she acquired to assets solely owned by Virginia, as to which she did not and could not acquire any title, but they do depend upon the agreement of Virginia to account for these assets or investments, at their fair value upon the date when the amount of the debt is to be ascertained. This is an absolute protection to West Virginia, as Virginia cannot recover any portion of the debt of West Virginia until those assets are thus accounted for and applied. This construction is in my judgment plain, clear, simple, equitable, just and completely and adequately protects every legal and equitable right of both of the parties thereto.

It is my conclusion, therefore, that the assets are to be valued as of January 1, 1861."

II. Second Exception.

The Bondholding Creditors of Virginia respectfully except to the failure of the Master to conclude or hold that the assets are to be valued as of June 20, 1863.

III. Third Exception.

The Bondholding Creditors of Virginia respectfully except to the failure of the Master to conclude or hold that the assets are not to be valued in excess of the price or amount that Virginia received therefor.

IV. Fourth Exception.

The Bondholding Creditors of Virginia respectfully except to the failure of the Master to conclude or hold that Virginia should not be charged with a value for the assets in excess of the price of amount that Virginia received therefor.

V. Fifth Exception.

The Bondholding Creditors of Virginia respectfully except to the allowance as the value of the Richmond, Fredericksburg & Potomac Railroad Company Stock as of January 1, 1861, and the basis upon this said allowance is reached as contained at pages 33 and 34 of the Master's Report as follows:

> "The dividend for 1860 was 7 per cent. No dividends were paid upon this stock in 1856, 1857 and 1858, and one-half of the dividend in 1854 and the whole of the dividend in 1855 were paid in bonds. Estimated at 7 per cent, this would increase the surplus $315,000, and would result in a corresponding increase in the book value. I do not think the stock quotations as reliable an indication of value as the actual 'conditions.' The book value and the earning value are so far apart that I do not take the (mathematical) book value as the standard, but combine the two, 150.04 plus 84.83 equals 234.87, one-half of which is 117.43. 2,572 shares at 117.43 is $323,167.36.
>
> I do not deduct 5 per cent to reach the 'cash market value,' as I do not use the book value as the standard of value.
>
> I allow ..... $323,167.36."

because the Master disregarded other competent evidence of value and considered solely the alleged "book value" and a capitalization of dividends for the next

preceding eleven years. The alleged "book value" is not competent or proper evidence and should not have been considered, and the Master should have capitalized the dividends for the next preceding five years as in case of the other securities, instead of the next preceding eleven years.

VI. Sixth Exception.

The Bondholding Creditors of Virginia respectfully except to the allowance as the value of the Orange & Alexander Railroad Company Stock and Loan as of January 1, 1861, and the basis upon which said allowance for the stock and loan is reached as contained at page 38 of the Master's Report as follows:

> "The average profits for five years ending and including 1860 were $30,061.45. It does not appear that anything is allowed for depreciation in any of the railroad stock estimates. This capitalized at 6 per cent would show a value of $501,024.16, or 24.57 per cent of $2,039,603.73, the total capital stock in 1860.
>
> There is such a wide difference between the mathematical book value and the value on an earning basis, that I do not feel justified in taking the book value as the standard of value, and I reach the value by combining the book and the earning value of 24.57 per cent of $50 a share, which is $12.28. Add to this the book value of $53.32, we have $65.60, one-half of which is $32.80, 17,490 shares at $32.80 is $573,672.
>
> I allow ..... $573,672.
>
> I do not deduct 5 per cent from the book value in this computation to get the actual cash market value, as I do not use the book value as the standard of value.
>
> If there is any basis for the contention vigorously insisted upon by the plaintiff that the value of all of these corporations was practically destroyed by the end of the war in 1865,

> their subsequent financial history can give no aid in determining their value January 1, 1861. The road was being operated at a profit. Its loan must have been good.
>
> I allow ..... $398,670.60,"

because the Master disregarded other competent evidence of value and considered solely the alleged "book value" and in capitalizing the profits the Master made no allowance for maintenance and depreciation. The alleged "book value" is not competent or proper evidence and should not have been considered, and the Master should have made a deduction for maintenance and depreciation in capitalizing the profits, the proper allowance for which would have entirely consumed the paper profits.

VII. Seventh Exception.

The Bondholding Creditors of Virginia respectfully except to the allowance as the value of the Richmond & Danville Railroad Company Stock and Loan as of January 1, 1861, and the basis upon which said allowance for the stock and loan is reached as contained at pages 40 and 41 of the Master's Report as follows:

> "The average profit of this road for the five years ending and including 1860 was $179,782.12. This capitalized would give $2,996,368.67. The profits increased from 1856 to 1860, $27,550.08, and the profit for 1860 was $45,286.86 in excess of the average, showing a marked increase in the earning value, and that the road was prosperous.
>
> For a stock which on the average for six years earned 9 per cent profit, a profit of about 11 per cent in 1860, and increased its profits from $139,489.12 in 1857 to $225,068.98 in 1860, or $85,579.86, it seems that a quotation of 57 or 60 is 'exceedingly' low.

> I do not think the stock quotations furnish as reliable an indication of value as the financial condition of the Company disclosed by the record.
>
> I think the 'cash market value' 137.37, minus 5, 132.37, is the best estimate I can make of the value of this stock.
>
> I allow ..... $1,588,440.
>
> This road was being operated at a profit. Its loan must have been good.
>
> I allow ..... $565,803.34,"

because the Master disregarded other competent evidence of value and considered solely the alleged "book value" and paper profits, and because the Master capitalized said book or paper profits without any allowance for maintenance or depreciation, instead of capitalizing the dividends. The alleged "book value" is not competent or proper evidence of value and should not have been considered. The book or paper profits without any proof of how they were arrived at and without any proof of deduction for maintenance and depreciation are not competent evidence of actual earnings and should not have been so considered and capitalized by the Master. The alleged "book value" only purports to represent original cost.

VIII. Eighth Exception.

The Bondholding Creditors of Virginia respectfully except to the allowance as the value of the Richmond & Petersburg Railroad Company Stock as of January 1, 1861, and the basis upon which said allowance is reached as contained at page 44 of the Master's Report as follows:

> "The profit for 1860 was $69,087.87, on a capital of $835,750, or more than 8 per cent $53,627.66, capitalized, is $893,794, or 106.95 per cent of the capital for 1860. All of the

> quotations for this stock are 'Last sales,' without any information as to when the 'Last sales,' took place, and at from 64 to 57 1/2. I do not feel at liberty to take these 'Last sales,' as against the condition disclosed in the record. As the value as shown by the earnings is less than the book value, I have combined the two, and the result is a value of $114.40.
>
> I allow ..... $441,126.40,"

because the Master disregarded other competent evidence of value and considered solely the alleged "book value" and paper profits, and because the Master capitalized said book or paper profits without any allowance for maintenance or depreciation, instead of capitalizing the dividends. The alleged "book value" is not competent or proper evidence of value and should not have been considered. The book or paper profits without any proof of how they were arrived at and without any proof of deduction for maintenance and depreciation are not competent evidence of actual earnings and should not have been so considered and capitalized by the Master. The alleged "book value" only purports to represent original cost.

IX. Ninth Exception.

The Bondholding Creditors of Virginia respectfully except to the allowance as the value of the Virginia Central Railroad Company Stock, as of January 1, 1861, and the basis upon which said allowance is reached as contained at page 46 of the Master's Report as follows:

> "The average net earnings of the road, annually, for four years, to and including 1860, were $221,234.06. I have excluded the net earning for 1856 of $381,176.68, or over 12 per cent on the then capital, as that appears to have been unusual. The net earnings for 1860

> were nearly 9 per cent of the then capital; $221,234.06, capitalized, is $3,687,234, or 116.-95 per cent of the capital for 1860. I disregard the stock quotation and the financial history subsequent to 1860, for the reasons already given. The value on the net earning basis is less than the book value. I do not deduct 5 per cent from the book value of this stock for its 'cash market value,' as I do not use the book value as the only standard of value. I reach the value by combining the book value and the earning value. 131.16 plus 116.95 equals 248.11; one-half is 124.05. $1,-927,382.57 at 124.05 is $2,390,918.08.
>
> I allow ..... $2,390,918.08,"

because the Master disregarded other competent evidence of value and considered solely the alleged "book value" and paper profits, and because the Master capitalized said book or paper profits without any allowance for maintenance or depreciation, instead of capitalizing the dividends. The alleged "book value" is not competent or proper evidence of value and should not have been considered. The book or paper profits without any proof of how they were arrived at and without any proof of deduction for maintenance and depreciation are not competent evidence of actual earnings and should not have been so considered and capitalized by the Master. The alleged "book value" only purports to represent original cost.

X. Tenth Exception.

The Bondholding Creditors of Virginia respectfully except to the allowance as the value of the Richmond, Fredericksburg & Potomac Railroad Company Dividend Bond as of January 1, 1861, and the basis upon which said allowance is reached as contained at page 73 of the Master's Report as follows:

> "The Richmond, Fredericksburg & Potomac Railroad Company was operated at a profit, and was able to pay on January 1, 1861.
> I allow ..... $149,984,"

because the Master disregarded competent evidence that the loan was paid in Confederate money of a total value in gold of $19,111.11, and other competent evidence which conclusively established that the Master should not have allowed in excess of said sum of $19,111.11.

XI. Eleventh Exception.

The Bondholding Creditors of Virginia respectfully except to the allowance as the value of the James River and Kanawha Company Stock as of January 1, 1861, and the basis upon which said allowance is reached as contained at pages 105 and 106 of the Master's Report as follows:

> "The average net returns for 25 years, $111,800, less the interest on $199,000, $11,940, is $99,860. I think it reasonable to assume that, if it had not been for the disturbing conditions caused by the war, this average might have been realized from the operations of the Company. This sum makes no allowance for depreciation; and there is nothing in the record, and I have not been able to find any data, which enables me to determine what allowance should be made therefor. I feel certain, however, that this property would require a substantial sum to take care of depreciation. In the absence of information, I do not feel at liberty to conjecture; and while I capitalize $99,860, as the only basis upon which I can predicate a conclusion, in doing so I feel that I reach an excessive valuation, particularly in view of its subsequent history. Capitalized at 6 per cent, we have a value of $1,664,333.

> As the amount of the net earnings would not equal the 6 per cent dividend on the $7,400,000 preferred stock of the State, the whole capitalization properly applies to the State's stock.
> I allow ..... $1,664,333,"

because the Master disregarded other competent evidence that the stock had no value as well as his previous finding to the same effect, and because the Master capitalized the assumed book or paper profits without making any allowance for maintenance or depreciation.

XII. Twelfth Exception.

The Bondholding Creditors of Virginia respectfully except to the failure of the Master to conclude or hold that Virginia had the right to use or apply the assets set out in Defendant's Supplemental Answer and the value or the proceeds thereof to the payment of $1,451,492.01 of the debt of the undivided Commonwealth of Virginia owing on January 1, 1861, and subsequently paid by Virginia at like cost to her, which debt was not included in the bonded debt of the undivided Commonwealth of Virginia as heretofore proved in this suit (Plaintiff's Supplemental Exhibit No. 1; New Record, Vol. Exhibits, pp. 289-295); and to the payment of $12,693,807.32 of interest on the bonded debt of the undivided Commonwealth of Virginia accrued since January 1, 1861, and paid by Virginia at a cost to her on a gold basis of $10,436,101.19 (Plaintiff's Exhibit No. 1, New Record, Vol. Exhibits, pp. 286-288; Plaintiff's Exhibit No. 5, New Record, Vol. Exhibits, p. 375; Plaintiff's Supplemental Exhibit No. 1A, New Record, Vol. Exhibits, pp. 296-299), and to the payment of a further sum of $2,218,319.81 for interest after January 1, 1872, on bonds issued by the present State of Virginia in exchange for the old unfunded bonds of the undivided State for

which Virginia issued her bonds in full (New Record, Vol. Exhibits, p. 419). This makes a total of $14,105,913.01, representing payments of common debts for which West Virginia and Virginia are each liable in the proportion of their respective shares, and no part of which is included in the common debt as heretofore determined. And Complainant respectfully excepts to the failure of the Master to conclude and hold that as Virginia has discharged common obligations, separate and distinct from and in addition to the common debt as heretofore determined, Virginia should not account to West Virginia for West Virginia's share of the fair value of the assets unless the fair value of the assets exceeds the amount of her expenditures for common obligations and then only to the extent of that excess.

Respectfully submitted,

1.

BONDHOLDING CREDITORS OF VIRGINIA,
By Holmes Conrad,
Their Attorney.

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MAR 20
JAMES D. M

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

No. 2 Original.

COMMONWEALTH OF VIRGINIA, COMPLAINANT,

v.

STATE OF WEST VIRGINIA, DEFENDANT.

COMPLAINANT'S EXCEPTIONS TO REPORT OF THE SPECIAL MASTER, DATED JANUARY 21, 1915.

By JNO. GARLAND POLLARD,
Attorney General of Virginia.

RANDOLPH HARRISON,
WILLIAM A. ANDERSON,
Of Counsel for Virginia.

APPEALS PRESS, 1333 E. Franklin Street, Richmond, Va.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

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COMMONWEALTH OF VIRGINIA, COMPLAINANT,

v.

STATE OF WEST VIRGINIA, DEFENDANT.

COMPLAINANT'S EXCEPTIONS TO REPORT OF THE SPECIAL MASTER, DATED JANUARY 21, 1915.

COMPLAINANT'S EXCEPTION NO. 1.

Complainant respectfully excepts to the finding and conclusion of the special master that the items embraced in the supplemental answer are to be valued as of January 1, 1861, as set out in his report at page 10, as follows:

> "The only right that West Virginia acquired as to these assets or investments, as against Virginia, was the right to require Virginia, on the date agreed upon, to apply the assets or investments, at their fair value at the time agreed upon, towards the

liquidation of her own debt, so that West Virginia could know, when the assets were so applied, the amount of the real debt remaining to which she would be obliged to contribute. It was perfectly competent for the two states to agree upon any date upon which the debt and the value of the assets and the investments, and the difference between the two, could be ascertained. West Virginia's rights do not depend upon any title that she acquired to assets solely owned by Virginia, as to which she did not and could not acquire any title, but they do depend upon the agreement of Virginia to account for these assets or investments, at their fair value upon the date when the amount of the debt is to be ascertained. This is an absolute protection to West Virginia, as Virginia cannot recover any portion of the debt of West Virginia until those assets are thus accounted for and applied. This construction is in my judgment plain, clear, simple, equitable, just, and completely and adequately protects every legal and equitable right of both of the parties thereto.

It is my conclusion, therefore, that the assets are to be valued as of January 1, 1861."

Because:

(1) There was no such agreement as the master has assumed;

(2) There is no warrant for such a construction found in the terms of the contract of separation between the two states; and

(3) The finding and conclusion of the master are in conflict with the decision of this court rendered March 6, 1911, whereby the court adopted as the mode of arriving at the equitable proportion of the principal of the debt to be paid

by the defendant the comparative value of the real and personal property of the two states *at the date of separation, June 20, 1863.*

COMPLAINANT'S EXCEPTION NO. 2.

Complainant respectfully excepts to said report for the failure of the master to find and conclude that the items embraced in the supplemental answer are to be valued as of the date of the separation of the two states, June 20, 1863—the date as of which the court, by its decision of March 6, 1911, determined the estimated valuation of the real and personal property of the two states as a basis upon which to apportion the debt between the two states.

COMPLAINANT'S EXCEPTION, NO. 3.

Complainant respectfully excepts to the master's report and the findings and conclusions thereof, for this, to-wit: that, in ascertaining and computing the value on January 1, 1861, of the shares of the capital stock of railroad companies the master erred, in that, disregarding other and competent evidence as to said values, he took and considered, solely, the "book values," and the alleged paper earnings of said companies for the periods more or less arbitrarily selected by him, as the same were inaccurately deduced from the book accounts of said companies, as evidence of the true value of said shares, as of said date.

Said "book values" did not constitute any valid or reliable evidence as to the true value of said properties inasmuch as they represented merely the original cost thereof; and both the said "book values" and the said "paper earnings" are unreliable and misleading as evidence of the true values of said properties because, in their computation no account whatever was taken of the depreciation and necessary cost of renewal of the physical properties of said companies.

This exception is respectfully taken and is asked to be considered as taken (as though the same were in each instance reiterated), to the findings and conclusions of the master, as expressed, and to the method by which the same were reached, as said method and findings are set forth: as to the holdings of Virginia in the Richmond, Fredericksburg & Potomac R. R. Co. at pages 32, 33 and 34 of the master's report; as to the Orange and Alexandria R. R. Co. at pages 36, 37 and 38; as to the Richmond and Danville R. R. Co. at pages 39, 40 and 41; as to the Richmond and Petersburg R. R. Co. at pages 42, 43 and 44; and as to the Virginia Central R. R. Co. at pages 45 and 46 of said report.

COMPLAINANT'S EXCEPTION, NO. 4.

Complainant respectfully excepts to the finding and conclusion of the master in allowing $149,984.00 as the basis for an item of charge against Virginia and of credit to West Virginia, being the value of a "dividend bond" of the Richmond, Fredericksburg and Potomac R. R. Co. held by Virginia, for which obligation Virginia realized only the equivalent of $19,111.11 in lawful money, that being the value of the Confederate currency in which said obligation was paid off by said company, which was all that the complainant ever realized or can ever realize from said dividend bond. (See plaintiff's exhibit, No. 3, 363 E.)

COMPLAINANT'S EXCEPTION, NO. 5.

Complainant further excepts to the findings and conclusions of the master as to the value as of January 1, 1861, of the holdings of Virginia in the James River and Kanawha Company, as set forth at pages 100 to 106 of his report, for the reason that said findings and conclusions and the grounds upon which they are based, are in conflict with the master's former finding, and with the

evidence in the cause, which demonstrates that after making the necessary, reasonable and moderate allowance for depreciation of its physical property. Said company was to all practical intents and purposes insolvent on and after January 1, 1861; and, at any rate, the holdings of Virginia therein, possessed no dividend earning capacity, and no appreciable value, whatever, on or after that date.

All of which are respectfully submitted.

COMMONWEALTH OF VIRGINIA,
By JNO. GARLAND POLLARD,
Attorney General of Virginia.

RANDOLPH HARRISON,
WILLIAM A. ANDERSON,
Of Counsel for Virginia.

FILE COPY.

Office Supreme Court, U.
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JAMES D. MAHER
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. 2, Original.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

Brief for the Bondholding Creditors upon the Exceptions to the Report of the Special Master, Dated January 21, 1915, upon the Issues Raised in the Supplemental Answer of West Virginia Claiming a Set Off Because of Certain Alleged Assets.

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1915

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The following pages contain an examination and criticism of the cases cited in the briefs of West Virginia presented to the Master to sustain the contention that "par value" and "book value" are evidence of actual value.

These cases may be urged before this Court by West Virginia. They do not establish the principles contended for but they do conclusively establish the direct opposite. They show that neither "par value" or "book value" are competent evidence to establish actual value.

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Supreme Court of the United States

OCTOBER TERM, 1914.

No. 2 Original.

COMMONWEALTH OF VIRGINIA vs. STATE OF WEST VIRGINIA.	In Equity.

Brief for the Bondholding creditors upon the exceptions to the report of the special master, dated January 21, 1915, upon the issues raised in the supplemental answer of West Virginia, claiming a set off because of certain alleged assets.

Statement of the Case.

The prayer of West Virginia's supplemental answer is as follows:

> "And now, having fully answered, this defendant prays that the amount and value of the assets as of January 1, 1861, and as of June 20, 1863, hereinbefore set out, that were acquired prior to said first named date by the Commonwealth of Virginia with the common funds of the two states, and were owned by her

> on said date, and subsequently appropriated to her own use in kind, or sold, and the proceeds of such sales so appropriated, or were given away by her, and for which the State of Virginia has not accounted unto the State of West Virginia, in whole or in part, may be ascertained; that twenty-three and one-half per cent (23 1/2%) of the value of said assets as of the one date or of the other, be likewise ascertained, and that the same be applied as a credit upon that portion of the principal of the Virginia debt assumed by this defendant, as heretofore determined by this Honorable Court, and that the balance thus found due and payable by this defendant, if any, be decreed without interest."

These assets are arranged in the answer and were presented at the hearing under seven groups as follows:

"Class A" relates to the money on hand in the treasury of Virginia.

"Class B" relates to the Richmond, Fredericksburg & Potomac Railroad Company stock. Virginia had 2,752 shares of the capital stock of this company which she still holds and owns. This is the only investment of all of those set up in the supplemental answer which Virginia has retained to the present time. All the others have perished or have been disposed of as hereinafter indicated.

"Class C" relates to various stocks and loans which were disposed of for old bonds of the undivided Commonwealth of Virginia and cash amounting to something over $6,000,000 (Exhibits, p. 12b; p. 107). This sum is arrived at by taking old bonds and accrued interest at par and payments made in Confederate money at face and not reduced to gold.

"Class D" relates to income from dividends and interest upon loans accrued prior to January 1, 1861,

and June 20, 1863, and subsequently collected by Virginia.

"Class E" represents bank stocks all of which except the stock received by West Virginia utterly perished with the Confederacy, and for which Virginia never received one cent.

"Class F" comprises certain securities subsequently sold by Virginia for $500,000.

"Class G" represents securities for which Virginia never received anything whatsoever.

There is no dispute about the figures. All that Virginia ever received in exchange for all of her investments was less than $7,000,000 and of this over $5,000,000 represented old bonds of the undivided Commonwealth of Virginia and accrued interest thereon and bonds Virginia issued to pay such interest; then worth in the market about $2,500.00 (Exhibits, pp. 360-363). The only stock Virginia retains today is the Richmond, Fredericksburg & Potomac Railroad Company stock.

And yet the Master reaches a result by which he charges Virginia with over $14,500,000 (Master's Report, p. 115). This is something over twice the amount that Virginia actually received for all her investments even if the old bonds of the undivided State and accrued interest thereon and bonds issued to pay such interest are taken at par and accrued interest.

The policy of Virginia with reference to her investment was declared in an Act passed March 26, 1853 (Record, Vol. 1, p. 652), and which contained a provision as follows:

> "3. If at any time the legislature shall direct a sale of the stocks held by the Commonwealth in internal improvement and other companies, the proceeds of such sale, if made before the payment of the public debt, shall constitute a part of the sinking fund, and be ap-

> plied in like manner. The sinking fund, and its accruing interest, shall not be otherwise appropriated than is herein directed, except in time of war, insurrection and invasion."

The policy declared in this statute was in accordance with the earlier policy of the State as declared in a statute passed April 9, 1838 (Record, Vol. 1, p. 662), which contained a provision as follows:

> "3. For the payment of the interest and the final redemption of the principal of any sum to be borrowed in conformity to this act, the stock of any joint stock company subscribed for or purchased with the money so borrowed, together with the dividends and other net income which may accrue therefrom to the Commonwealth, or to the fund for internal improvement, shall be, and the same are hereby appropriated and pledged. * * *"

These provisions did not make it incumbent upon Virginia to sell the investments at any time but they did provide that if Virginia should sell her investments that so long as any of the debt was outstanding the proceeds of the investments should go to liquidate the debt. Virginia has always scrupulously complied with this provision.

In February 1866 almost as soon as the war was over Virginia passed a statute to provide for settlement with West Virginia of the debt of the old State but West Virginia refused to treat with the Commissioners appointed by Virginia. Again in 1870 Virginia endeavored to get West Virginia to settle the debt question and again West Virginia failed to respond (West Va.'s Appendix to West Va.'s Comp., Vol. 1, pp. 444-454) Virginia being unwilling to delay settlement with her creditors longer in 1871 passed a statute authorizing the settlement of West Virginia's share of the debt by arbitration and herself

settled with the bondholding creditors to their satisfaction, by paying with her new bonds at like rate of interest, two-thirds of the old bonds and all accrued interest thereon to date; and two-thirds of all bonds previously issued to pay interest on the original debt with interest on such bonds (Original Record, pp. 17-21).

It was not until after Virginia had passed the statute authorizing arbitration that West Virginia was ever willing to treat with Virginia and then she was only willing to discuss, not to settle or arbitrate. The West Virginia Commission then appointed made a report known as the Bennett Report of 1871 in which they found West Virginia's share of the debt to be about $950,000. The Senate Finance Committee of West Virginia repudiated this finding and reported that West Virginia owed nothing (West Va.'s Appendix to West Va.'s Comp., Vol. 1, pp. 454-493).

It has been already stated that of approximately $7,000,000 received by Virginia for her investments, over $5,000,000 was exchanged for the old bonds of the undivided State and accrued interest and that less than $2,000,000 some of which was paid in Confederate money was received in money. Virginia since January 1, 1861 has paid off common obligations, seprate from and in addition to the common debt heretofore determined in this case in sums aggregating over $14,000,000 (Exhibits, pp. 285-299).

Under the statute of 1853 referred to above, old Virginia, if she disposed of any of her investments, was bound to apply the proceeds thereof to the extinguishment of the debt. It is proved on this hearing that Virginia paid off about one million and a half of principal debt in addition to the debt heretofore proved in this case (Exhibits, p. 289), and up-

wards of $12,000,000 of interest on the old debt of the undivided State (Exhibits, pp. 285-299).

West Virginia and Virginia were one in 1853 and the statute referred to and quoted from above, is as binding upon West Virginia as upon Virginia. Virginia having applied the proceeds of the investments to the discharge of common obligations as she was bound to do cannot now be charged by West Virginia with the value of such investments.

Virginia, while insisting that West Virginia has no right whatever to any of these investments or the proceeds thereof contends that the value of the investments should be determined as of June 20, 1863, and not as of January 1, 1861, and that in no event should she be charged with more than she actually received therefor. West Virginia claims that Virginia should be charged with the value of the investments as of January 1, 1861, claiming that Virginia is in the position of a thief or one who has wrongfully taken possession of property. Virginia denies this. The Master placed his decision upon a new ground, not supported by any evidence in the case either in this record or the original record. His reason for valuing the assets as of January 1, 1861, was that Virginia made an agreement "to account for these assets or investments at their fair value upon the date when the amount of the debt is to be ascertained." The agreement contained in Article VIII, Section 8 of West Virginia's Constitution will not bear any such construction.

In addition to this error as to the date as of which the investments are to be valued, the Master fell into serious error in determining their value. He found it unnecessary to determine the value as of June 20, 1863, and reported values only as of January 1, 1861. In the stocks which are the subject of our fifth, sixth, seventh, eighth and ninth exceptions, the Master

relied upon the so-called book values of the securities. In the case of the Richmond, Fredericksburg & Potomac Railroad Company there was a trial balance although the accountant for West Virginia admitted for reasons which we shall point out later that the so-called book value based upon it was of doubtful value in arriving at the value of the stock. In the case of the other four railroad stocks the alleged book value is not book value at all, but merely the par value as of the year 1856 to which were added annual paper profits without knowing or showing in any way how the profits were made up, or what charges were made for maintenance or depreciation, or to what extent the capital had been impaired.

The Master refused to consider public quotations of actual current sales for these securities published in the Richmond papers of the time and relied upon by the community as representing the correct market values of the securities.. His reason for this is not entirely clear but apparently the fact that there was not an established stock exchange and that the sales of the securities, judged by modern standards were few, seemed to him to require that the quotations should be disregarded. These quotations were being continuously and continually published in the Richmond Despatch, a paper of the highest reputation in Richmond, from quotations furnished by brokers of the highest reputation, based upon actual sales made by the brokers, and the quotations were relied upon by the community. . It seemed to Virginia that the market so established was in every sense an open and true market and represented market values just as much as if the quotations were quotations made upon a stock exchange.

Certainly, at this late day, over fifty years after the period in question the quotations furnish a much bet-

ter guide for the Master to the value of the securities than these alleged book values which, as regards the railroads, with one exception, were nothing but the par value as of 1856, plus alleged paper profits, without any knowledge whatever of how they were made up; without any knowledge of the maintenance, depreciation or other operating charges; and without any knowledge of the actual value of the corporate assets.

No one of these companies ever paid a dividend after 1864 except the Richmond, Fredericksburg & Potomac Railroad Company which paid one dividend in 1874 and finally resumed dividends in 1882, and the Exchange Bank, which in 1865, paid dividends on a gold basis of 3/200 of one per cent.

In discussing the different securities later we shall show that the values found by the Master to which we except are not justified by the dividend records of the companies nor by any of the other circumstances bearing upon the value of the assets or the business of the various corporations; nor the conditions prevailing in Virginia at the time.

Finally we shall show that West Virginia has no right, title or claim to these investments or the proceeds or the value thereof, on any basis.

West Virginia was admitted into the Union under a Constitution defining her rights and liabilities. The Constitution made no reference whatever to these investments. West Virginia could have made no claim against Virginia on account thereof and having no claim against Virginia, because of the investments or their value, she cannot offset their value in this suit.

We will discuss these points under the following heads.

FIRST: *The value of the assets should be determined as of June 20, 1863, and not as of January 1, 1861.*

*There is no evidence in the new or the original record to sustain the finding of the Master that "West Virginia's rights * * * depend upon the agreement of Virginia to account for these assets or investments at their fair value upon the date when the amount of the debt is to be ascertained." There is no duty resting upon Virginia to charge her as of any date prior to June 20, 1863.*

SECOND: *In no event should Virginia be charged with more than she actually received for the investments.*

THIRD: *The proof discloses that the value on January 1, 1861, of the investments held by Virginia did not exceed $8,661,462.70.*

FOURTH: *The proof discloses that the value on June 20, 1863, of the investments held by Virginia, did not exceed $1,389,313.56.*

FIFTH: *The proof discloses that the proceeds of all the investments received by Virginia did not exceed $3,630,006.10.*

SIXTH: *Even if West Virginia should be found entitled to twenty-three and one-half per cent (23½%) of the value of the assets claimed by West Virginia in no event would this reduce the amount of West Virginia's share of the principal sum heretofore determined because Virginia subsequent to January 1, 1861, from her separate and individual resources or from the proceeds of the assets in question paid off obligations of the old undivided State for which West Virginia was liable as to her share to an amount far in excess of the value of the assets received*

by Virginia. Virginia is entitled to use and apply the investments held by her and the value or the proceeds thereof to the payment of the obligations of the undivided Commonwealth of Virginia.

SEVENTH: *West Virginia's claim if proved will not reduce the amount, owing by West Virginia for either principal or interest in any degree. West Virginia's equitable proportion was determined on the basis of the ratio of the total wealth of the two States. It is immaterial what proportion of the wealth of either State was held in common by the State or in separate ownership by individuals, or what proportion of the wealth of either State was created by the proceeds of the common debt.*

EIGHTH: *The terms upon which West Virginia was admitted into the Union are all set out in the contract evidenced by the three documents (220 U. S., 28), viz., The Constitution framed for West Virginia, the Act of Virginia consenting to the creation of the new State and the Act of Congress admitting the new State. Neither this court or the Congress can add one term or condition now to that contract.*

NINTH: Interest.

POINT ONE.

The value of the assets should be determined as of June 20, 1863, and not as of January 1, 1861. There is no evidence in the new or the original record to sustain the finding of the master that "West Virginia's rights, * * * * depend upon the agreement of Virginia to account for these assets or investments at their fair value upon the date when the amount of the debt is to be ascertained." There is no duty resting upon Virginia to charge her as of any date prior to June 20, 1863.

A. *There is error in holding as is held in paragraph Second, page 10 of the Master's Report, "that the assets are to be valued as of January 1, 1861."*

The "assets" here referred to are specifically set out in the supplemental answer filed on June 8, 1914, under leave of the Court granted in the opinion of the Court delivered on that day. It is stated in the answer, page 12:

> "FIRST: That, prior to the establishment of the State of West Virginia out of the territory of the Commonwealth of Virginia on the twentieth day of June, 1863, and prior to the first day of January, 1861 (West Virginia, by her Constitution, having assumed an equitable proportion of the public debt of the Commonwealth of Virginia existing prior to the latter date), the Commonwealth of Virginia purchased with the bonds that evidenced her public debt existing prior to the first day of January, 1861, or out of the proceeds of the sale thereof certain stocks, bonds, securities and other properties, and made loans to various persons and companies, and was the owner and holder of said stocks, bonds, securities and other properties on the first day of January, 1861, as well as upon the twentieth day of June, 1863, and, after said last named date, has continued until the present time to hold, own and enjoy the fruits of a portion of said securities and properties; has sold certain other portions thereof for many millions of dollars; collected said loans, and given away the residue of said securities, without the knowledge or consent of this defendant, except as hereinafter stated."

The claim asserted in said answer is that West Virginia is entitled to have twenty-three and one-half per cent of the amount in value of said assets credited to her, and applied as a set off to the principal of the debt as ascertained by the Court in 220 U. S., 1.

If the claim so asserted has any elements of merit whatever wherein is the propriety or the lawfulness of ascertaining the value of such assets as of January 1, 1861? A bare recital of the historical facts should suffice to repel such contention.

On November 28, 1861, the people of that portion of the Territory of Virginia which now forms the State of West Virginia assembled in convention and

framed a constitution for the proposed new state. By Section 8 of Article VIII, of that Constitution it was provided as follows:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

On June 20, 1863, Congress passed the Act for the admission of the new State of West Virginia into the Union. Up to the 20th day of June, 1863, all the territory now forming West Virginia and all the people residing in that territory were part and parcel of the Commonwealth of Virginia; were subject to her jurisdiction and derived their civil and political rights and liabiilties under her Constitution and laws. Prior to the 20th day of June, 1863, the State of West Virginia could have no civil or political rights, or be subject to any liabilities for the reason that she had no civil or political existence. The Constitution although framed in November, 1861, had no effect or operation and indeed had no existence as the Constitution of a State of this Union, until June 20, 1863. The provision contained in Section 8 of Article VIII of that Constitution as to the assumption by West Virginia of a proportion of the public debt of Virginia "prior to the first day of January, 1861" took effect only from the 20th day of June, 1863.

It is indeed true, that there existed from June, 1861, until June 20, 1863, two States of Virginia. One, the ancient Commonwealth of Virginia, was, after April 17th, 1861, at war with the Government of the United States; the other, the "Restored State of

Virginia" was created in June, 1861, and was recognized by the Government of the United States, as the real and only State of Virginia. It was this "Restored State of Virginia" composed almost entirely of the people of the present State of West Virginia—that gave the consent of Virginia to the erection of a new State within her territory and framed the Constitution for the proposed new State. It cannot be doubted for a moment, that the "Restored State" would have consented to any terms that might have been suggested, for the equalization of the burden of the public debt between the Commonwealth of Virginia and the new (proposed) State of West Virginia, in such proportion as might seem to it to be equitable. It would have consented that Virginia should be charged with the value of all the public property of every kind that remained within her borders. It would have consented to a provision for "owelty of partition."

It might and doubtless would have consented to all these things had it been asked or had it been suggested that it would be prudent for it to do so. But it did consent to but one thing and that was the erection of the new State, under the provisions of the Constitution that had been framed for it. The Master, in his report on page 10 says:

> "West Virginia's rights do not depend upon any title that she acquired to assets solely owned by Virginia, as to which she did not and could not acquire any title, but they do depend *upon the agreement of Virginia to account for these assets or investments, at their fair value upon the date when the amount of the debt is to be ascertained.*"

The thousand of pages of this record afford no colour of ground for this assumption. No such agreement on the part of Virginia—even of the "Restored

State" was ever made or implied from the facts here shown.

Mr. Justice Holmes, speaking for the Court in Virginia vs. West Virginia, 220 U. S., page 28, refers to the Constitution of West Virginia and to the Act of Congress admitting West Virginia and says:

> "These three documents would establish a contract without more. We may add, with reference to an argument to which we attach little weight, that they establish a contract of West Virginia with Virginia. There is no reference to the form of the debt or to its holders, and it is obvious that Virginia had an interest that it was most important that she should be able to protect. Therefore West Virginia must be taken to have promised to Virginia to pay her share, whoever might be the persons to whom ultimately the payment was to be made."

Nowhere in these three documents or elsewhere can be found any agreement on the part of Virginia "to account for these assets or investments at their fair value, upon the date when the amount of the debt is to be ascertained."

And if such was the agreement between the parties that the assets should be valued *"upon the date when the amount of the debt is to be ascertained"* how can the Master justify himself in fixing the first day of January, 1861, as the date for such valuation?

The only agreement that is shown here, between Virginia and West Virginia, is the agreement evidenced by the three documents, viz: That Virginia consented to the erection of the new State, within her territory, upon the terms and provisions of the Constitution framed for the new State.

B. *The assets should not be valued as of any day earlier than the 20th day of June, 1863.*

1. For the reasons already assigned why they should not be valued as of January 1, 1861.

The Master in his report at page 10 seeks to overcome these reasons, as follows, viz:

> "It may be said that this conclusion results in an incongruity, as West Virginia did not become a State until June 20, 1863, and could not therefore acquire any title to the assets or investments on January 1st, 1861, as she was then non-existent."

The reply to that position is that it is without any foundation in fact. Nowhere in this record has it been claimed or suggested on the part of Virginia or of her bondholding creditors that West Virginia's claim to have twenty-three and one-half per cent of the value of these assets applied as a set off to the amount ascertained and determined as Virginia's claim (220 U. S., 35) rested upon any claim of title by West Virginia to such assets. Our objection is that by this report there is recognized and allowed to West Virginia as a credit an amount equal to twenty-three and one-half per cent of the therein reported value of these assets as of January 1, 1861.

It will be argued later on that the values reported are artificial and excessive; that West Virginia had no interest whatever in these assets and no valid claim to any part of the value thereof; and further that if she had any such interest or claim she had no right to have the amount of the value of such interest applied in this suit, as a counterclaim or set off to the amount of the principal debt heretofore ascertained to be due by her to Virginia.

But if Virginia is to be charged in this suit with the value of twenty-three and one-half per cent of the assets which consisted of the debris of the unfinished works of internal improvement which were constructed with the money borrowed by Virginia and

evidenced by the interest bearing bonds that "represented the public debt of the Commonwealth prior to January 1, 1861," which debris remained within the limits of Virginia after the secession from the Commonwealth of the State of West Virginia—then we insist that such assets should be valued not earlier than the 20th day of June, 1863, the date of the creation of the State of West Virginia. So much indeed we think this Court has already decided. In Virginia vs. West Virginia, 220 U. S., 34, this Court said:

> "We are of opinion that the nearest approach to justice that we can make, is to adopt a ratio determined by the Master's (report of March 17, 1910) estimated valuation of the real and personal property of the two States on the date of the separation, June 20th, 1863."

This was to be sure in estimating the basis of West Virginia's liability to Virginia of her proportion of the principal of the debt, but if Virginia's claim against West Virginia was properly ascertained as of that date, what reason can be suggested for departing from that date in estimating the amount of West Virginia's claim for her proportion of the assets or investments which West Virginia now seeks to apply as a set off?

POINT TWO.

In no event should Virginia be charged with more than she actually received for the investments.

This and the previous point present our first four exceptions. It has been shown that there is no evidence in the record to warrant the Master's finding that Virginia made an agreement "to account for these assets or investments at their fair value upon the date when the amount of the debt is to be ascertained." Section 8 of Article VIII of the West Virginia Constitution contains no such provision. Nor is there any evidence in the record to warrant the contention of West Virginia that the conduct of Virginia created a duty upon her to account for the investments at their fair value on January 1, 1861. On the argument before the Master, West Virginia's attorneys were repeatedly asked what Virginia had done that she ought not to have done or had failed to do that she ought to have done to impose this liability upon her. In reply counsel for West Virginia compared Virginia to a thief; or to one who had gone into a jewelry shop, taking a jewel without permission, intending to return it, but who had lost the jewel; or to an heir who, after he had received a valuable inheritance, declined to open the testator's strong box and apply the assets therein contained to the payment of the testator's debts and in the meantime the assets had become worthless.

There is no evidence in the record to sustain these contentions of West Virginia. Until June 20, 1863, West Virginia was a part of the old State of Virginia and it could not be certainly said that she would be admitted as a State. Until the events occurred it could

not be said that Congress would give its consent or that West Virginia would comply with the conditions Congress imposed.

Even if the admission of West Virginia as a State had been definitely known in advance, this did not impose upon the undivided State of Virginia or the present State of Virginia then non-existent, the duty of disposing of the assets at an impossible price or guaranteeing their value. Certainly on January 1, 1861, no duty rested upon Virginia to account for these assets and no duty could possibly arise before the dismemberment of the old State, June 20, 1863. In the meantime there was war between the States and on June 20, 1863, the value of these assets was rapidly reaching the vanishing point to which it arrived with the collapse of the Confederacy. It cannot be doubted that if Virginia had attempted to sell these assets on January 1, 1861, they would have realized far less than the sum which the Master finds as their value on that date, and with the war they started to decline in value. During the war there was no market for these investments in any large amounts either within or without Virginia. When the war ended the investments were worthless. It was only by holding them for many years and exchanging them for the unfunded bonds of the old State which with some accrued interest were then selling at approximately fifty per cent (50%) of par that Virginia was able to realize anything whatever on her investments. There is no evidence that Virginia might have received more than she did get, and there is no question but that the sums realized were far in excess of anything that could have been secured by any other or different disposal.

The Act of the General Assembly of the Restored State of Virginia, passed February 3, 1863, referred to in Paragraph VIII of the Bill and printed in full in West Virginia's Compilation, Vol. 1, Appendix, pp.

441-443, provided for an accounting by West Virgin for her share of the proceeds as of the time when sh became a State. It cannot be that West Virginia to account for her share as of June 20, 1863, and th Virginia is to account for her share as of January 1861. Aside from the provisions of the statute in th regard, the investments belonged to undivided Vi ginia until June 20, 1863. West Virginia's separat right, if any, did not arise until then and she canno assert a claim based upon this right until the righ arose. Any depreciation of the investments of un divided Virginia prior to the dismemberment is th loss of both States and cannot be charged to Virgini alone.

Furthermore, the Court has already decided in th case that West Virginia's share shall be determine as of June 20, 1863. After the decree of referenc was originally entered in this suit (Original Recor pp. 173-175), West Virginia made a motion to modif it to provide that West Virginia's share should be de termined as of January 1, 1861, instead as of June 20 1863 (Original Record, pp. 179-180), but the Cour denied the motion (Original Record, p. 207). Th Court decided in the original decree of reference tha the amount in value of the assets which West Virgini received from undivided Virginia should be deter mined as of June 20, 1863. It seems very clear tha the investments retained by Virginia must be value as of the same date.

In this connection Paragraph VIII of defendant' original answer is instructive and reads in part as fo lows:

> "and respondent avers that she is not charge able in any settlement for or on account of suc stocks or credits with any sum in excess of th actual market value of the same at the time when they were transferred to her; and sh

> avers that at the times when such stocks and credits were transferred they were greatly depreciated and were of but little value."

If the Court decides differently, however, we submit that in no event should Virginia be charged with more than she actually received for the investments.

POINT THREE.

The proof discloses that the value on January 1, 1861, of the investments held by Virginia did not exceed $8,661,462.70.

The value of Virginia's investments will be presented in this point by groups under the same headings that they are classed in the answer and were considered at the hearing.

CLASS A.

Cash.

The Master finds that the cash in the Sinking Fund of the Commonwealth of Virginia on January 1, 1861, was $819,250.03, and no exception is taken to this finding.

Virginia used this cash and much more to pay interest on the common debt (Exhibits, pp. 285-288, including insert pages 287a-287b). Furthermore, West Virginia received $170,771.46 from the Restored Government of Virginia at the time of her creation (Original Master's Report, p. 181).

CLASS B.

Richmond, Fredericksburg & Potomac Railroad Company.

2,752 shares of the capital stock of the Richmond, Fredericksburg & Potomac Railroad Company. (The bondholding creditors' fifth exception and West Virginia's second exception.)

The defendant claims a value of $150 a share amounting to $412,800 (Exhibits, pp. 2, 66), based

upon an alleged book value. Virginia claims the value of the stock at $210,528.00 based upon market quotations (Exhibits, pp. 334, 381). The Master disregarded the quotations entirely and determined the value of this stock by averaging the alleged book value with a sum secured by capitalizing average dividends over a period eleven years next preceding. He treated dividends paid in bonds afterwards discharged in Confederate money as if paid in gold. The Master allowed $323,167.36.

Market Quotations.

The market quotations upon which Virginia relies are contained in Plaintiff's Revised Exhibit No. 2 (Exhibits, pp. 322-358; also New Record, pp. 1197-1297). It appears from the depositions of Mr. John L. Williams and others printed in the record at pages 1197-1297, that the quotations upon which the plaintiff relies were printed in the Richmond Despatch, a newspaper of the highest reputation in Richmond; that the quotations were furnished by John Lancaster & Son, Lancaster & Co., and by Davenport & Co., brokers of the highest standing based upon actual sales, and that these market reports were recognized and accepted by the community and relied upon accordingly. Judged by the standards of today the transactions were not many and they were not made upon the floor of an authorized stock exchange. It is difficult to see however how such added facts could have added to the reliability of the quotations. The quotations seem to us to meet all the technical requirements of the cases cited by the Master. Under the circumstances of this case where values of over fifty years ago are seeking to be established the quotations furnish a much better guide than anything else the Master could secure to act upon. It is true there were not quotations for all the securities. Some of the se-

curities apparently were not dealt in, but the fact tha
some of the securities were not traded in is no reaso
for rejecting the quotations of those securities whic
had a market value. At page 23 of the Master's re
port a criticism by the plaintiff of the quotation found
for the James River and Kanawha Company's stock i
treated by the Master as a recognition by the plaintif
of the infirmity of the quotations for all of the securi
ties. This is not so, as will be fully explained whe
that stock is reached. Virginia's holdings of this stock
were not traded in. The quotation was for the stock
in the hands of the public and this had a special valu
not belonging to Virginia's stock which accounted fo
the quotation. The quotation is not criticised. Its ap
plication to Virginia's stock only is disputed. Quota
tions based on last sales of the stock of the Richmond
Fredericksburg & Potomac Roilroad Company were
reported on December 14, 1860, and again on January
4, 1861, at $76.50 per share (Plaintiff's Revised Ex
hibit No. 2, Exhibits, p. 334). While it is unques
tionably true that an attempt to sell 2752 shares of thi
stock in the market at that time would have depressed
the market price far below $76.50, the quotation here
given is undoubtedly the best measure of the fair valu
of the stock on January 1, 1861, to be had at this time.
On the basis of this quotation the total value of Vir
ginia's shares amount to $210,528.00 (Exhibits, p
381).

Book Values.

The plaintiff feels that these quotations where they
exist are by far the most reliable evidence of the valu
of the securities to be had today, over fifty years afte
the time as of which the values are sought to be es
tablished and at all events they are far more reliabl
than the artificial book values relied upon by the de
fendant. In the case of the Richmond, Fredericks

burg & Potomac Railroad Company there was a balance sheet, but Mr. Hillman, the accountant for West Virginia admits that the figures he presents for determining the value of the assets received by West Virginia are of doubtful value (Record, pp. 452-455). All that Mr. Hillman did so far as his examination of this stock is concerned was to confine his examination to the liability side of the company's balance sheet from which he took the amount of the outstanding capital stock and the paper surplus, without paying any consideration to or taking any account of the actual value of the assets or whether the road and its intangible assets had an equal or any value wnatsoever at that period (New Record, pp. 333-334). This on West Virginia's own cases cited in West Virginia's briefs before the Master and reviewed in Schedule 2 hereof is entirely incompetent evidence for the purpose of showing in this case either the value of the railroad's assets or its stock.

Dividends.

Until dividends were paid in Confederate money in 1862, all dividends paid after 1854 were paid not in cash but in bonds, except the dividend for 1861 and that was not paid until 1873 (Defendant's Exhibit No. 2; Exhibits, p. 2; Defendant's Exhibit No. 12, Exhibits, pp. 230-231). Dividends paid in 1859 and 1860 in bonds were finally paid in Confederate money in March and July of 1863, when Confederate money was at the rate of 7 2/5 to 1 for gold (Original Record, p. 647), and each dividend in gold amounts to 9/10ths of 1 per cent per year. The dividend in 1861 of 3 1/2 per cent was not paid until 1873. The subsequent dividends paid up to the time when dividends ceased in 1864 reduced to a gold basis are shown in Schedule 1 at the end of this brief.

Summary.

This railroad did not reach its present prominence until in recent years when together with the Washington Southern Railway Company running south from Washington, it formed the Washington Richmond Line connecting the trunk lines of the north and those of the south. It was unable to pay a casa dividend after 1854 until 1862, when payments were made in Confederate money. Considering that the road was unable to pay a cash dividend after 1854 until the inflated currency of the Confederacy made this possible after 1862, and considering the dividends stopped for almost twenty years after 1864, the price of $76.50 per share, as established by plaintiff's quotations, is certainly a top-notch figure if it is not entirely too high. The par value on the cases cited in West Virginia's briefs before the Master is no evidence of value and Mr. Hillman, according to his own testimony, took no account of the actual value of the assets or whether the road had any value whatsoever at that time. Furthermore, the method pursued by Mr. Hillman in determining book value discredits itself because it purports to show a much larger value for the stock of this railroad on June 20, 1863, than on January 1, 1861. According to the defendant's testimony, value of this stock on September 30, 1864, exceeds its value on March 31, 1864, and this in turn exceeds the value on March 31, 1863. A method which reached such absurd results is not entitled to any credit in determining the value on any of the dates.

CLASS C.

Securities Exchanged or Otherwise Disposed of by Virginia.

1. Orange & Alexandria Railroad Company.

17,490 shares, at $50 par value, $874,500.

Loan $398,670.60.

(Bondholding creditors' sixth exception and West Virginia's third exception.)

West Virginia claims an alleged book value for this stock of $53.32 per share, aggregating $932,566.80 and that the loan was worth par. There was no market quotation for the stock in 1861 and Virginia claims that the maximum with which she can be charged for the stock and loan are their sales value of $441,662.98 (Exhibits, pp. 360-361). The Master disregarded all other evidence and based his finding upon an average of the alleged book value and a capitalization of the alleged profits. These profits show no allowance for depreciation or maintenance. The injustice of the Master's method of determining all of these values is very well illustrated by this item. It appears from the Master's report that no dividends were declared in 1860 or 1861, and that all the dividends Virginia had ever received during the entire period of the company's life up to 1861 was less than $32,000.00. This is approximately 5 per cent on the par value of her stock. These dividends were paid not in money but in bonds. The bonds were afterwards paid off in Confederate money at a value in gold of about $1,300 (Master's Report, p. 37; Exhibits, p. 370).

The average earnings of the company according to its books for five years preceding 1860 was about 1 ½% of its capital without showing any deduction for

deprecitation or maintenance (Master's Report, p. 38). Ten cents on the dollar would be a high value for a railroad stock on such a showing. Nevertheless the Master reaches a value of $32.80 per $50 share, or over 65 per cent of par amounting to $573,672.00.

West Virginia's answer at page 27 undertakes to establish a value for the securities and property listed under Class C as January 1, 1861, from the sales or exchanges thereof, made in most instances long after the termination of the war. Although certain sums of money passed as part consideration to Virginia for the surrender of these assets, the principal consideration to Virginia was the surrender of her bonds. A part of these bonds were the old unfunded bonds of the undivided State upon which West Virginia was equally liable with Virginia, and the balance were bonds issued by Virginia under the Act of March 2, 1866. It is necessary to bear in mind that all of the bonds issued under the Act of March 2, 1866, were issued to pay accrued interest on the old bonds of the undivided State. West Virginia is seeking here to reduce by setoff her share of liability for the principal sum already determined and not to reduce the total debt outstanding for principal and interest. If sales value is to be taken as evidence of actual value as of January 1, 1861, then the consideration received by Virginia must be reduced to a cash basis. The bonds received must be reduced to cash on the basis of their market value and the cash if paid, in Confederate money must be reduced to gold on the basis of the ratio for Confederate money at the time of the exchange as shown at page 647 of the old Record. West Virginia cannot blow hot and cold. On the theory of this contention the bonds became Virginia's absolutely upon the separation, and she was not a trustee for West Virginia in regard thereto. At the time of the exchange in question Virginia could have bought

her bonds in the open market of the New York Stock Exchange at the then prevailing quotations upon the New York Stock Exchange as the same appear in Plaintiff's Revised Exhibit No. 2 (Exhibits, pp. 345-358). Furthermore that is all the holders could have secured for these bonds if they had undertaken to sell them. In fact that was all the bonds were worth to anyone at that time and if this exchange is to be taken as a measure of the value of the securities surrendered by Virginia the medium of exchange must be reduced to a cash value (Plaintiff's Exhibit No. 3, Exhibits, pp. 360-361). Item No. 1 gives the total sales value of the Orange and Alexandria Railroad Company's stock and loan at $441,662.69. The supporting figures for the bonds and cash are found in the same exhibit (Exhibits, pp. 365-368).

Market Quotations.

No quotations for this stock appear in the Record as of January 1, 1861.

Book Value.

The purported book value as shown in Defendant's Exhibit No. 3, Asset No. 1 (Exhibits, pp. 14-15) is no evidence at all. It does not even purport to be book value. All the statement purports to do is to take the par value of the stock based upon a balance sheet as of September 30, 1856, not in evidence, and add the paper profits for subsequent years (New Record, p. 100; Exhibit, p. 14). The statement is not based upon the assets of the road in any sense. It is based solely upon the par value of the stock and the paper profits as shown upon the books of the company. The profits are not verified. It does not appear that anything was allowed for maintenance or depreciation.

Dividends.

The only other evidence bearing upon the value of these securities are dividends and the only dividends shown are a small amount of dividends upon preferred stock, rate not given; and one dividend in 1864 of 4 per cent in Confederate money amounting in gold at 25 to 1 to 16/100 of 1 per cent (Defendant's Exhibit No. 3, Exhibits, pp. 14-15; Defendant's Exhibit No. 12, Exhibits, p. 227).

Summary.

As the stock was not paying dividends, and the only evidence of value as introduced by the defendant is the par value of the stock with the paper profits for the years 1856 to 1860, it would seem that the sales value allowed $441,662.98 for the stock and loan in Plaintiff's Exhibit No. 3, Exhibits, pages 360-363 is a generous amount. The paper profits for the year 1860 only purported to be a little over 1 per cent of the stock and for the year 1859 are less than that. Without conceding the correctness of the figures we say that a stock which is only earning about 1 per cent (and this makes no allowance for the preferred stock) cannot be said to be worth more than 10 per cent of par and a loan of a company operating on such a narrow margin would sell much below par. A bond of a company only earning 1 per cent upon its capitalization cannot be said to be worth over 60 per cent of its face, but allowing 75 per cent this would make $300,000 for the loan. Taking the stock at 10 per cent would make $87,450 for the stock. This gives a total of $387,450 as a top notch figure for the value of the Orange & Alexandria Railroad Company's stock and loan upon the basis of West Virginia's figures (Exhibits, pp. 14-15). It should be noted that the first column of Plaintiff's Exhibit No. 3 states West Virginia's claim. The par amount of

the securities under Class C is to be found in Defendant's Exhibit No. 3 (Exhibits, pp. 12a-12b).

2. Richmond & Danville Railroad Company.

12,000 shares, par value $100, cost $1,188,598.50. Loan $565,803.34.

(The Bondholding Creditors' seventh exception and West Virginia's fourth exception.)

West Virginia claims an alleged book value for this stock of $137.37 per share, aggregating $1,632,777.76 and that the loan was worth par. The market quotations for the stock in January, 1861, was $57.00 per share and Virginia claims that the maximum with which she can be charged for the stock and loan are their sales value of $609,986.83 for the stock and $322,876.22 for the loan (Exhibits, pp. 360-361). The master accepted West Virginia's alleged book values but deducted $5.00 per share for expenses and shrinkage in liquidation and allowed $132.37 per share as the value for the stock (Master's Report, p. 41). He allowed $1,588,440.00 for the stock and par for the loan. Here was a stock, quoted in the Virginia market at $57.00 per share which paid no dividends in 1856, 1857 and 1858, and which declared a dividend in 1859 of 4 per cent which was paid in 1860, and declared no dividend in 1861 (see below) and the master finds that it is worth $132.37 per share based upon West Virginia's alleged book values.

In the first place the allowance for shrinkage and expenses in liquidation is absurdly low, and the master concedes as much at page twenty-nine of his report. The master should have taken judicial notice that the expenses and shrinkage due to liquidation would be much nearer fifty per cent than five per cent.

Thayer's Preliminary Treatise on Evidence at the Common Law, pp. 278, 301, 302.

Furthermore these book values on which West Virginia relied were simply the par value of the stock as of the year 1856 (New Record, p. 116; Exhibits, p. 191), plus alleged paper profits since then; without considering what allowances were made for maintenance or depreciation of the railway's property; without considering how the operating expenses were determined and without any reference as to whether the assets had decreased in value since 1856. To be sure the master feels his value is fortified by the reported profits of the railroad for nine years prior to 1860 which he finds to average about 11 per cent, but these paper profits are subject to the same infirmity as the book values which they are cited to fortify. It does not appear how they were made up; what charges were made to maintenance or depreciation; whether they represented cash profits or were merely book-keeping entries to capital account. If the earnings had really been as large as the railroad report would indicate, it is extraordinary that the dividend record should have been so poor. There is no question about the dividends and the dividend record does not tune with these paper profits. If the stock was worth $132.37 per share as the master finds, it is extraordinary that its market prices as shown from the quotations for 1860 and 1861 should never have been above $60.00 per share.

The market value of the bonds exchanged for the Richmond & Danville Railroad Co.'s stock was $609,986.83 and the market value of the bonds exchanged for the loan was $322,876.22 (Item No. 2, Plaintiff's Exhibit No. 3, Exhibits, pp. 360-361). The supporting figures are given on Exhibits, pages 365-366. It is to be noted that in this item as well as in the preceding and every other item under Class C the market

value of all bonds is computed whether they are bonds for principal issued prior to January 1, 1861, or bonds for interest issued under the Act of 1866. What was said under Item No. 1 about reducing the bonds to cash value in accordance with their then market value is not repeated here but equally applies.

Book Value.

The criticism about the defendant's method of computing book value under Item No. 1, applies equally to this item. Par value of the stock as of 1856 is taken to which is added the paper profits for subsequent years (Exhibits, p. 19; New Record, p. 116). There is no evidence of value.

Dividends.

The dividend appearing for the years 1859 and 1860, (Defendant's Exhibit No. 3, Exhibits, p. 19), was shown to be a repetition (New Record, p. 380). We have a dividend of 4 per cent declared in 1859 and paid in 1860; two dividends of 3 per cent each paid in Confederate money in 1862 and one dividend of 4 per cent paid in Confederate money on March 25, 1863 (Defendant's Exhibit No. 12, Exhibits, p. 71); and one dividend of 6 per cent paid on September 9, 1863, and a dividend of 5 per cent paid on March 26, 1864. Then dividends stopped forever (Defendant's Exhibit No. 12, Exhibits, p. 227). Until 1862 in the Confederate period the only dividend shown is one dividend of 4 per cent declared in 1859 and paid in 1860. On the record this is the only dividend the company ever paid except the dividends paid in Confederate money.

Market Quotations.

Plaintiff's Revised Exhibit No. 2 (Exhibits, p. 339, gives the quotation for this stock at $57.00 which

would amount to about $680,000 as the value of this stock.

Summary.

In the light of the Company's dividend record this figure is undoubtedly too high. A stock which paid no dividends in 1856, 1857 and 1858 and which declared a dividend in 1859 of 4 per cent which was paid in 1860 and declared no dividend in 1861 certainly could not be worth $57.00 per share on the first day of January, 1861. Considering the stock and loan together the figures stated in Plaintiff's Exhibit No. 3 under the column headed "Total" (Exhibits, p. 361) are a fair allowance for Item No. 2. It cannot be said that the loan was worth its face because the loan was not due on January 1, 1861, and before the loan became due and before Virginia could collect it the company became unable to pay without any fault on Virginia's part. The value of this stock and loan is a difficult matter to determine but considering all the evidence the Record affords it does not seem fair to charge Virginia with more than she received.

3. Richmond & Petersburg Railroad Company.

3,856 shares at $100, $385,600.

Dividend bonds $33,408.

(The bondholding creditors' eighth exception and West Virginia's fifth exception.)

There is no question about the dividend bonds.

West Virginia claims an alleged book value of $121.86 per share, aggregating $469,892.16.

The market quotation in January, 1861, was $64.00 per share on which basis the stock was worth $246,784.00. The master reaches his value of $441,126.40 by averaging the so-called book values and the paper profits as already explained. As in the other cases

book value is determined by taking the par value as of the year 1856 and subsequent paper profits (Exhibits, p. 22; New Record, p. 126). The method adopted by the Master reaches a result nearly twice as big as any published public quotation for the stock in Richmond for the years 1860 and 1861.

The cash value of the bonds received by Virginia for this stock is $357,100.92 and the dividend bonds amounting to $33,408.00 were paid off in money equal to gold (Exhibits, p. 361). The supporting figures are found at Exhibits, pages 366-368.

Book Value.

The purported book value of this company like Items Nos. 1 and 2 is reached by taking the par value of the stock in 1856 and adding the subsequent paper profits (Exhibits, p. 22). As repeated above this is no evidence of value and is not even book value.

Dividends.

The dividends paid by the Company are shown at Exhibits, pages 22 and 227 and those paid after 1861 are collected in schedule I at the end of this brief. For the years 1857 to 1860 inclusive they are approximately 6 per cent. No dividends were paid in 1861 and 1862.

Market Quotations.

The market quotations for the stock are $64.00 (Plaintiff's Exhibit No. 2, Exhibits, p. 338), on which basis the stock held by Virginia is valued at about $246,784.00. This is less than the exchange value computed in Plaintiff's Exhibit No. 3 (Exhibits, p. 361).

4. Virginia Central Railroad Company.

Stock, $1,891,670.68
Loan, $90,032.82
Dividend Bonds, $143,508.00.

(The bondholding creditors' ninth exception and West Virginia's sixth exception.)

West Virginia claims in her answer $321,458.17 for all of these securities but on the hearing claimed a value $2,481,115.26 based upon an alleged book value of $131.16 per share.

The quotation for the stock in January, 1861, was $50.00. The dividends (see below) are approximately 4 per cent in 1859, 5 per cent in 1860 and nothing in 1861 or 1862. Virginia concedes a total value of $517,906.50. The Master by combining the alleged book value with capitalized paper profits finds the stock had a value of $124.05 per share. He allowed $2,390,918.08 for the stock and par for the loan, and bonds. This result for the stock is two and a half times as great as any published public quotation for this stock in Virginia in 1860 and 1861 and is reached as in the preceding cases by taking par value as of the year 1856 and subsequent paper profits without any knowledge whatever of the company's assets or how its earnings were determined.

The securities under this item were exchanged by Virginia for bonds and cash of the value of $517,-906.50 (Exhibits, p. 361). The supporting figures are found at Exhibits pages 366-368.

Book Value.

The purported book value of the stock of this item like the three preceding items is reached by taking the par value of 1856 and adding subsequent paper profits (Exhibits, p. 24). As has been repeatedly stated this is no evidence of value.

Dividends.

The dividends paid as shown at Exhibits, pages 24 and 227 and collected in Schedule I are approximately 4 per cent in 1859 and 5 per cent in 1860 and nothing in 1861 and 1862.

Market Quotations.

Quotations for the stock at $50.00 per share are found in Plaintiffs' Revised Exhibit No. 2. (Exhibits pp. 336-337). The quotation based upon the dividend record is too high. The value of Virginia's holdings on the basis of the quotation is about $963,691.00 and considerably larger than the amount Virginia received in exchange for the stock and loan as shown at page 361.

Summary.

As to these four items it appears that the purported book value is merely the par value as of 1856 plus alleged paper profits of subsequent years without paying any consideration whatever to the value of the assets or the reality of the profits. Such figures are no evidence of value whatever. As to all the subsequent items in Class C even such purported book value is missing and par value is relied upon by the defendant. The so-called exchange value relied upon in the answer and in the Defendant's Original Summary Exhibit (Exhibits, p. 13) is discarded for a claim based solely upon par. The cases cited in West Virginia's briefs before the Master overthrow this contention and if any value is to be found for the remaining property and securities grouped in Class C it must be based solely upon the price received by Virginia therefor years afterwards.

19. RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY.

Loan, $149,984.

(The Bondholding Creditors' Tenth Exception.)

This loan was represented by a dividend bond and was afterwards paid off on March 13, 1863, and July 1, 1863, in Confederate money, at a value in gold of $19,111.11 (Exhibits, pp. 363, 369), and Virginia cannot be charged in excess of that sum.

Keppler's Administrators vs. Petersburg Railroad Company; John Rep. Chase's Dec., p. 212.
Box, *et al.* v. Queenshaw, same Vol., p. 224.

SUMMARY—CLASS C.

January 1, 1861.

1. Orange & Alexandria Railroad Company:		
Stock and Loan		$441,662.98
2. Richmond & Danville Railroad Company:		
Stock	$609,986.83	
Loan	$322,876.22	932,863.05
3. Richmond & Petersburg Railroad Company:		
Stock	$357,100.92	
Dividend Bonds	33,408.00	390,508.92

4. Virginia Central Railroad Company:	
Stocks, Loan and Dividend Bonds	517,906.50
19. Richmond, Fredericksburg & Potomac Railroad Company	19,111.11
Items 5-18 inclusive. Master's figures are accepted and total	977,031.41
Total	$3,279,083.97

CLASS D.

No exception is taken to the allowances of the Master under Class D. They aggregate $345,554.80 (Master's Report, page 84).

CLASS E.

BANKS.

(West Virginia's eleventh, twelfth, thirteenth and fourteenth exceptions.)

West Virginia has excepted to the Master's finding in regard to the four banks located in Virginia because he has allowed five per cent for expenses and shrinkage in liquidation. This five per cent was deducted from the full amount of West Virginia's alleged book values and it must be apparent that the actual cost in liquidation would have far exceeded this amount.

West Virginia's expert, Mr. Hillman admitted that it would cost at least five per cent to liquidate any of these corporations (New Record, p. 622), and West Virginia has no reason to complain of the result. The bondholding creditors feel that the amount allowed by the Master is too large because it exceeds the actual market value as shown by the quotations and also be-

cause the allowance of five per cent is grossly inadequate to cover the expenses and shrinkage in liquidation. They have not excepted his findings for any of the items under Class E. His allowance for these items as of January 1, 1861, aggregate $3,802,357.48 (Master's Report, p. 94).

The quotations for bank stock are found in Plaintiff's Revised Exhibit No. 2 (Exhibits, pp. 340-344). No quotations were found for the Northwestern Bank or the Fairmont bank in West Virginia or for the Bank of the Valley in Virginia.

Farmers' Bank of Virginia.

The market quotation on January 4, 1861, is par, and on this basis the plaintiff allows $962,600.00 (Plaintiff's Exhibit No. 7, Exhibits, p. 382), as the value of this stock which agrees with the amount of the claim in West Virginia's answer.

Bank of Virginia.

The market quotation on January 4, 1861, is par which gives a value of the stock of $963,620.00. This also agrees with the claim as stated in West Virginia's answer.

Bank of the Valley.

No quotation was found for this stock, but was taken at par because this is the average of the other Virginia Banks at the time, and gives a value for Virginia's holdings of $483,900.00, which agrees with the amount claimed in West Virginia's answer.

Exchange Bank.

The market quotation on January 4, 1861, is $101, and gives a value for Virginia's holdings of $884,255, which exceeds the amount claimed in West Virginia's answer by nearly $9,000. The cross-examination de-

veloped the fact that Mr. Hillman made certain changes in the titles of accounts in his alleged book values of these banks, for instance, designating surplus and contingent funds as profit and loss (New Record, pp. 473, 486; Plaintiff's Exhibit Nos. 10-15, inclusive; Exhibits, pp. 398-417, as compared with Defendant's Exhibit No. 5; Exhibits, pp. 48-55). The exhibits also disclose the failure of Mr. Hillman to allow for certain bad and doubtful debts (New Record, pp. 475, 489, 503, 504), which would substantially reduce the book values computed by him.

THE PAPER VALUE OF THE BANKS IN VIRGINIA AS OF JANURY 1, 1861.

In regard to the Farmers' Bank of Virginia the bad debts are $70,773.96 and the doubtful debts are $45,437.34 (Exhibits, p. 400). The account also shows a contingent fund of $337,067.05. Aside from any question as to whether these book entries unsupported by extrinsic evidence are proof of value these three accounts must be deducted. The burden is upon West Virginia and until proof that doubtful debts can be collected or that the contingency will not arise these accounts must be omitted. The earnings of this bank for the year ending January 1, 1861 are $138,101.18 (Exhibits, p. 399). The dividend was $228,440.25 (Exhibits, p. 48), so that the bank failed to earn its dividend this year by $90,339.07.

The Bank of Virginia had bad debts of $6,412.00, and doubtful debts of $43,973.57, and a contingent fund of $219,189.72 (Exhibits, p. 404), all of which should be deducted in determining paper value.

The Bank of the Valley had a defalcation ascertained to amount to $13,522.12, with an unascertained liability estimated at $30,000.00 (Exhibits, pp. 406-407). The dividend for this bank for the year 1860,

amounted to $91,125.00 to pay which the surplus fund for that year was reduced $4,519.60, without making any deduction for the ascertained and unascertained loss on account of the defalcation amounting to $43,-522.12. If these items are deducted from net earnings for the year ending January 1, 1861, as they should be and the amount is added to the amount by which the surplus for the year was reduced in order to pay the dividend it appears that this bank did not earn one-half the amount of its dividend for the year 1860 (see New Record, pp. 502-505).

The exchange Bank of Virginia had a contingent fund amounting to $191,584.24 (Exhibits, pp. 409, 410). Its earnings for the year 1860 were $150,586.-05 (Exhibits, p. 409). Its dividend was $235,282.50 (Exhibits, p. 52). The Company failed to earn its dividend in that year by $84,695.45 (see New Record, p. 506).

The Master's allowances for each of these banks exceed the amount claimed by West Virginia in her supplemental answer.

CLASS F.

(West Virginia's Fifteenth Exception.)

The reasons for the Master's findings are fully explained in his report. He allowed $204,688.42 (Master's Report, p. 98).

CLASS G.

James River and Kanawha Company.

(Bondholding Creditors' Eleventh Exception.)

The bondholding creditors contend that the state's holding in the stock of this company were worthless.

This was the result of an exhaustive inquiry on the previous hearing (Original Master's Report, Paragraph Seventh, p. 193). The extracts referring to the company taken from Document No. 17, and Mr. Potter's schedules based thereon, showing a deficit in the operation of the company of not less than $1,320,955.-75, without any allowance for depreciation; and Mr. Potter's extracts from the annual reports of the company in the possession of the Chesapeake & Ohio Railroad Company, for the years ending September 30, 1860, 1861, 1862 and 1863, showing a deficit for each year (New Record, pp. 1077-1194), abundantly confirm the Master's original finding that the stock of this company had no value. Defendant's Exhibit No. 7 (Exhibits, pp. 176-198) discloses the fact that stockholders in this company, other than Virginia were to receive one share of new five per cent stock for each two shares of the old James River & Kanawha stock held. This agreement was authorized at a meeting of the company held in August, 1860, and must have been known, talked about and agitated for a very long period prior thereto. None of Virginia's stock was ever sold in the market; it was all retained by Virginia. The old James River Company was originally a branch of the Board of Public Works. The prospective exchange for this new five per cent stock is sufficient to account for the market value of the stock held by others than Virginia. With the exception of one dividend paid in 1836, no dividends were ever paid on the stock. Virginia never received anything for her stock. The financial results of the operation of the company was a net loss. The company was always a liability to Virginia, never an asset. The evidence conclusively establishes the fact that the stock was worthless.

GENERAL SUMMARY OF THE VALUE OF ALL INVESTMENTS.

JANUARY 1, 1861.

Class A (Master's figures accepted)	$819,250.03
Class B	210,528.00
Class C (Master's figures accepted for Items Nos. 5-18 inclusive)	3,279,083.97
Class D (Master's figures accepted)	345,554.80
Class E (Master's figures accepted)	3,802,357.48
Class F (Master's figures accepted)	204,688.42
Class G	00.
Total value of investments of undivided Virginia on January 1, 1861	8,661,462.70
23 1/2 per cent of above total	2,035,443.73
Value of investments received by West Virginia (Master's Report, p. 116)	541,467.76
23 1/2 per cent of the total value of the investments of the old Commonwealth of Virginia on January 1, 1861, less the value of the investments received by West Virginia	1,493,975.97

POINT FOUR.

The proof discloses that the value on June 20, 1863, of the investments held by Virginia, did not exceed $1,389,313.56.

An abnormal anomalous condition of affairs, existed. "Dollars," in Virginia, in 1861 and 1863, meant a very different thing from "dollars" in New York and Boston. A bushel basket could hardly contain the amount of Confederate money the housekeeper in Richmond had to take to market in order to buy enough meat for breakfast. The quotations of the stock market published in the Richmond papers and stipulated to by the counsel to be correct are to be found in the pages above given. These also show the prevailing market quotations. The Master has proceeded on the assumption that markets, and sales and business transactions moved in Richmond as they did in New York, and he has judged accordingly. Only very old men, or wounded men, or men under permanent physical disabilities were to be found in the market place.

CLASS A.

CASH.

Defendant's Exhibit No. 1, 1863 (Exhibits, pp. 91-93) correctly states the amount of cash in Virginia's Treasury on June 20, 1863, except that the dollars are Confederate dollars and not gold dollars. Reduced to gold on the basis of seven and one-half Confederate to $1.00 in gold makes the amount $327,895.51 (Exhibits, p. 383). This sum and much more, whether treated as Confederate or gold was used by Virginia

to pay interest on the common debt (Plaintiff's Exhibit No. 1; Exhibits, pp. 285-288, including insert pages 287a and 287b). When the state was divided, West Virginia got $170,771.46 (Original Master's Report, paragraph Sventh, p. 181).

The Master in finding values for 1861 allowed under Class A, only the money in the sinking fund of Virginia, and declined to allow for the money in the other funds. West Virginia has accepted this finding. The cash in the sinking fund of Virginia, on June 20, 1863, only amounted to $143,195.90. The balance was contained in the Literary Fund, Board of Public Works and Commonwealth Fund. Virginia is only to be charged with the money in the sinkfund. $143,195.90 in Confederate money, reduced to gold, on a basis of seven and one-half Confederate to $1.00 in gold (Original Record, p. 647) gives $19,092.79, as the value in gold, of the money in the sinking fund of Virginia, on June 20, 1863.

CLASS B.

Richmond, Fredericksburg & Potomac Railroad Company stock was sold on May 27, 1863, for $110.00 per share (Plaintiff's Revised Exhibit No. 2, Exhibits, p. 334). Confederate currency reduced to gold, on the basis of seven and one-half to one gold, gives a total of $40,362.67 for Virginia's holdings in this company, as of June 20, 1863.

The extracts from the Richmond Despatch, forming a part of the depositions recently taken at Richmond discloses the prohibitive figures which commodities had reached at this time. Real estate in Virginia was depreciated one-half at this time, according to the finding of the Master on the original hearing. Plaintiff's depositions in regard to values and condi-

tions generally in Virginia, and in regard to the condition of the railroads and banks in Virginia, at this time, are set out in the original record, pages 737-786. Defendant's depositions taken to prove that the James River Company's stock was worthless, found in the original record at pages 867-899, also throw some light upon conditions in Virginia at this time. It must be apparent in addition to the very great destruction of the real and personal property of the railroads of Virginia, that commerce had practically disappeared, owing to the fact among other things that all available men were fighting in the war; money and currency in Virginia already had depreciated to seven and one-half to one; commodities had reached a prohibitive price and real estate was reduced one-half. A railroad right of way is worthless for any other purpose than a railroad, owing to its shape and the cuts, fills and ballast which are necessary to make a roadbed, destroy its value for farming or building purposes. It would be more expensive to repair an abandoned right of way for purposes other than a railway than it would be to purchase an equal amount of contiguous land. The railroad's private business had ended. The possibilities of profitable railroad operation, except the carrying of soldiers, had ended in Virginia, in 1863, and the Government contracts were only payable in Confederate values. Dividends on the Richmond, Fredericksburg & Potomac Railroad Company, on a gold basis, amount to about two per cent in 1863 and less than one-half of one per cent in 1864, and then ceased entirely until 1882, with the exception of one dividend paid in 1874 (Exhibits, pp. 2, 80). The cases cited in West Virginia's briefs state the permanency of the business is one of the things to be considered in determining value. There was no permanency to this railroad or any other bank,

or canal company in Virginia at this time. In the light of all the surrounding circumstances, which is what West Virginia's cases say, must be considered in determining the value of the stock, the amount here conceded, as the market value at the time, is a fair value of Virginia's holdings in this stock.

Defendant's book values of $183.60 for 1863; $187.-69 for March and $203.54 for September 30, 1864, are absurd (Exhibits, p. 94). Among the assets is $500.-00 in gold carried at 30 to 1 at $15,000.00 (Exhibits, p. 100) and a slave carried at $3,005.00 nearly two years after the Emancipation Proclamation (Exhibits, p. 103). Many Confederate obligations and securities are carried at face value (Exhibits, pp. 100, 104). It has been remarked that the quotations are missing in a great many of the securities listed in defendant's supplemental answer and it is important to note here that the Richmond, Fredericksburg & Potomac Railroad Company is the only railroad security, in fact is the only security outside of the banks where a book value is even pretended. In all the other cases it is merely par value, plus alleged paper profits. In the case of the banks some accounts have been changed in name as to indicate a contingent fund as a profit and that bad and doubtful debts have been included as assets. This is sufficient to impeach these accounts even if they were evidence. It has also been pointed out that on the cases cited in West Virginia's briefs book accounts and book entries unsupported by extrinsic evidence of actual value of existing assets are no evidence either of the value of the assets of the corporation or its stock.

CLASS C.

1. ORANGE & ALEXANDRIA RAILROAD CO. STOCK AND LOAN.

This stock was sold in Richmond on April 18, 1863, and again on August 12, 1863, at $27.50 per share (Exhibits, p. 338), which reduced to gold on the basis of 7 1/2 to 1 gives a value for this stock of $32,065.00 (Exhibits, p. 385). The condition of the Orange & Alexandria Railroad Company after the beginning of the war in 1861 is stated in its president's and superintendent's reports (New Record, pp. 955-962). Aside from the very small dividends on the preferred stock as shown above under 1861 values the only dividend was paid in 1864 which amounted in gold at 25 to 1 to 16/100 of 1 per cent (Defendant's Exhibit No. 3, Exhibits, p. 227). West Virginia admits in her schedule of this stock that the statement is valueless (Exhibits, p. 108), and therefore takes the alleged book value as of September 30, 1860. The fact of the war would render the statement of 1860 valueless for determining the value in 1863 even if the statement of 1860 had any value as evidence. It appears on referring to the statement of 1861 however that it is based upon par value as of 1856 plus alleged paper profits and the profits then were only about one per cent (Exhibits, p. 14). The fair inference under all the circumstances is that neither this company or any of the other companies listed in Class C could have paid their loans if called upon to do so and the value of this item above stated to amount to $32,065.00 is taken as the value of the stock and loan.

2. RICHMOND & DANVILLE RAILROAD CO. STOCK AND LOAN.

This stock was sold on May 27, 1863, at $125.00 per share and is quoted at that price on June 5, and June 10 (Exhibits, p. 339), which reduced to gold on the basis of 7 1/2 to 1 makes the total holdings of Virginia in the stock of this company amount to $198,099.75. The dividends of this company are one dividend of four per cent declared in 1859 and paid in 1860 (*supra*); one dividend in 1863 amounting in gold to less than one-half of one per cent, and one in 1864 amounting in gold to less than one-quarter of one per cent (Exhibits, pp. 19, 227). A schedule of all dividends is annexed where references and ratios for gold are stated. The alleged book value given in Defendant's Exhibit No. 3 (Exhibits, p. 116), is merely the par value of the stock and alleged paper profits. There is nothing in the record to indicate that this company could have paid its loan in 1863 or in any subsequent period during the war and the above amount allowed as the value of this item fairly represents the value of this asset, both stock and loan at the time.

3. Richmond & Petersburg Railroad Co. Stock.

This stock was quoted in Richmond on January 5, and again on January 10, at $140 per share (Exhibits, p. 338) which reduced to gold on the basis of 7 1/2 to 1 gives a total of $71,987.66 as the value of Virginia's holdings in this stock (Exhibits, p. 385). Again the book value relied upon by West Virginia is not book value but par value and alleged paper profits (Exhibits, p. 121). The dividends paid on the stock when reduced to a gold basis are about 1 1/3 per cent for 1863 and 3/5 of 1 per cent for 1864 when they ceased entirely.

4. VIRGINIA CENTRAL RAILROAD CO. STOCK AND LOAN.

The stock was sold in Richmond on May 2, 1863, at $94 per share and was quoted on June 5 at $100 per share (Exhibits, p. 337). This reduced to gold on the basis of 7 1/2 to 1 gives $268,531.67 as the value of Virginia's holdings in the stock of this company (Exhibits, p. 385). The alleged book value stated (Exhibits, p. 124) is not book value but par value plus alleged paper profits and is no evidence of value. The dividend record of this company is zero in 1861 and zero in 1862 and on a gold basis 1/4 of 1 per cent in 1863 and 12/100 of 1 per cent in 1864.

The fair inference from the known conditions in Virginia at this time is that the company could not have paid its loan and the value herein given for this item is a fair value for Virginia's holdings in this company for both stock and loan.

19. RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY'S loan of $149,984 was paid in part on March 13, 1863, and in part on July 1, 1863. The portion paid on July 1, 1863, in Confederate money reduced to gold at the then prevailing ratio (original record, p. 647) amounts to $13,607.11 and this must be taken as the value on June 20, 1863.

OTHER SECURITIES AND PROPERTY LISTED IN CLASS C.

There is no evidence in the case of the value of the remaining properties and securities listed under Class C except the absence of dividends and earning power and the general conditions prevailing in Virginia at the time as stated above under Class B. The Blue

Ridge Railroad Company earned a small amount of tolls paid in Confederate money (Exhibits, p. 27). No remaining stock or loan paid any dividend or interest until it was disposed of by Virginia. The subsequent sale or exchange value made long after the termination of the war is no evidence of value on June 20, 1863, and it is submitted that on the depositions in the original record cited above and the facts that the Master should have judicially noticed and the Court will notice the general conditions prevailing in Virginia were such that the remaining securities and claims in Class C were of little or no value whatever. At all events the defendant has failed to show any value for any of the securities listed under Class C as of this date. Considering the plaintiff's quotations in the light of the dividend records of these companies, the permanency of their business, and the general conditions in Virginia all the securities listed under Class C taken together cannot be said to have a value in excess of the total value herein allowed for items Nos. 1, 2, 3, 4, and 19.

The claim against the United States Government certainly had no value at this time and the same may be said in regard to the claim against Selden-Withers Company.

The size of the profits reported in items Nos. 1, 2, 3 and 4 when we consider the destruction of property discredit the books for 1863 and 1861 as well. The bookkeeping must have been very loose not to note the destruction we know occurred. Furthermore like the Richmond, Fredericksburg & Potomac Railroad Company the business must have come from the Confederate States and the payments must have been in Confederate securities or obligations.

SUMMARY—CLASS C.

June 20, 1863.

1. Orange & Alexandria Railroad Company	$ 32,065.00
2. Richmond & Danville Railroad Company	198,099.75
3. Richmond & Petersburg Railroad Company	71,978.66
4. Virginia Central Railroad Company	268,531.67
19. Richmond, Fredericksburg & Potomac Railroad Company	13,607.11
	$584,282.19

CLASS D.

Plaintiff's Exhibit No. 4a (Exhibits, pp. 373, 375), has taken the gross amount of income in Defendant's Exhibit No. 4-1863 (Exhibits, pp. 149, 150) but reduces the payments made in Confederate money to gold on the basis of the then existing ratio as shown in the exhibits. The gross amount stated in Plaintiff's Exhibit No. 4a agrees with the amounts set out in Defendant's Exhibit No. 4-1863 except in the case of the claim against the United States Government where there was no income. Each item of income is separately stated in the exhibits with an indication of how the computation is arrived at. The table shows this more clearly and concisely than a narrative could indicate.

CLASS E.

The record in regard to quotations and sales of Virginia Bank stock is found in Plaintiff's Revised

Exhibit No. 2 (Exhibits, pp. 340-344). The quotations are reduced to gold on the basis of 7 1/2 to 1 and the computations upon Virginia's holdings are set out in Plaintiff's Exhibit No. 8, Subschedule XXX (Exhibits, p. 384). No quotations are found for the Bank of the Valley and the finding of $64,520.00 allowed as the value of its stock is determined by other factors. This is on a basis of $13 to $14 per share. The dividends of the Bank of the Valley amount in gold to approximately 1 1/3 per cent in 1863 paid in January of that year and 17/100 of 1 per cent in 1864 paid in March of that year (Exhibits, p. 51). The Bank expired with the Confederacy, hopelessly insolvent. The stock received nothing and was a total loss to all holders. On the principles for establishing value as set out in the cases cited at page 41 of the brief of Judge Holt and Attorney General Lilly before the Master this stock was worthless. Its assets were in the process of evaporation; its liabilities were daily increasing; gold was already at a premium of 7 1/2 to 1; the prices of commodities were so high as to be almost prohibitive (extracts from the Richmond Dispatch returned with depositions taken at Richmond, New Record, pp. 1251-1255; 1279); the value of real estate had depreciated one-half; the country was in the midst of a war for its existence; dividends were only nominal and about to stop forever. The condition of this bank was so bad it could not make a statement after 1861 (Exhibits, p. 156). A statement for 1861 is no evidence of where this bank stood in 1863. We contend that the conditions prevailing in Virginia and the condition of this bank (the fact that the dividends were dwindling towards nothing and soon to stop forever; that its assets were diminishing; its liabilities increasing and that it went out of business hopelessly insolvent in 1865) require a finding that the stock of the Bank of the Valley on June

20, 1863, was worthless. The same is true of the Farmer's Bank of Virginia; Bank of Virginia and the Exchange Bank. There are no reports or book values for any of them after 1861 (Defendant's Exhibit No. 5, Exhibits, pp. 152-159). Their dividend records are found at pages 48, 50, 52, 79 and 80 of the exhibits and are collected in the schedule at the end of the brief. In regard to the Northwestern Bank and the Fairmont Bank both located in West Virginia the values found in the report of the Special Master (pp. 92, 93) control. West Virginia's banks were not wiped out by the war. Their currency was the United States currency and the finding of the Master in paragraph Seventh of his original report exceeds these allowances and are for June 20, 1863 (p. 193).

Northwestern Bank of Virginia stock held by West Virginia is valued at $297,683.30. Fairmont Bank stock is valued at $49,435 (Special Master's Report, pp. 92, 93).

CLASS F.

The Master's allowance for 1861 is adopted—$204,688.42.

CLASS G.

For the reasons stated above in the discussion under the period of 1861 we submit that the stock held by Virginia in the James River & Kanawha Company and the Manassas Gap Railroad Company is worthless and of no value on June 20, 1863.

GENERAL SUMMARY OF THE VALUE OF ALL INVESTMENTS.

JUNE 20, 1863.

Class A	$19,092.79
Class B	40,362.67
Class C	584,282.19

Class D		57,595.17
Class E	(Banks in present Virginia, Exhibits, p. 384)	483,292.32
Class F		204,688.42
Class G		00.
Total		1,389,313.56
Value of investments received by West Virginia	+	541,467.76
Total value of investment received by Virginia and West Virginia		1,930,781.32
Twenty-three and one-half per cent of above total		453,733.61
Value of investments received by West Virginia	—	541,467.76
Twenty-three and one-half per cent of the total value of the investments of the old Commonwealth of Virginia on June 20, 1863, less the value of the investments received by West Virginia		00.

POINT FIVE.

The proof discloses that the proceeds of all the investments received by Virginia did not exceed $3,630,-006.10.

CLASS A.

CASH.

The money in the Sinking Fund of Virginia on June 20, 1863, reduced to a gold basis was $19,-092.79 and this is all the cash with which Virginia can be charged (see Class A, Point Four, *supra*).

CLASS B.

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY.

The defendant, introduced in evidence market quotations from January 1, 1914, to September 1, 1914, to show the present value of the Richmond, Fredericksburg & Potomac Railroad Stock held by the State of Virginia (Exhibits, pp. 281, 282).

These market quotations are merely bid and asked prices. They do not purport to represent actual sales. They are not as reliable as the market quotations introduced by the plaintiff which were based upon actual sales and they should not be considered unless the market quotations introduced by the plaintiff are accepted. We assume however that the Court will feel that these published public prices introduced by both the defendant and the plaintiff will be accepted as the best measure of the value of the different stocks and bonds obtainable in this case and will accept them. These quotations show a value of the Richmond, Fredericksburg & Potomac Railroad Company's stock now held by Virginia of $300 per share, at which

price the value of Virginia 2,752 shares today would aggregate $825,600.

West Virginia is seeking to offset her alleged share of these investments against the principal amount of her share of the bonded indebtedness of old Virginia. The bonds are interest bearing bonds and in order to determine the correct amount to be offset against principal, the value of today must be discounted back to the time when interest on the principal begins to accrue. Applying the same principles to this item as the Master used in regard to items Nos. 5-18 inclusive, in Class C gives a value of a little less than $200,000, for this stock. The result is very fair to West Virginia. We have shown that on June 20, 1863, its then real value was only $40,362.67 (see Class B, Point Four, *supra*). If West Virginia should be credited with the present value undiscounted, such value would have to be offset not only against West Virginia's share of the principal; but the accrued interest thereon as well. In determining the sum to be offset against principal, the proceeds of all investments as of date received must be discounted back to the time when interest begins to accrue.

CLASS C.

The Master has adopted this principle in regard to Items Nos. 5-18 inclusive and we accept his figures. For these items the Master's figures amount to $977,031.41.

Applying the same principles we reach a total of $2,179,991.20 as the proceeds received by Virginia for her investments in items Nos. 1-4 in Class C.

It must be borne in mind in this connection that the proceeds of the investments received by Virginia were almost exclusively bonds of the old undivided State with some accrued interest thereon and bonds

which Virginia issued to pay interest on the bonds of the old State (Exhibits, pp. 360-363). The par value of the bonds of old Virginia taken in exchange was only $3,100,098.84 (Exhibits, p. 362). The balance was accrued interest and bonds given to pay interest (Exhibits, p. 362). The market value of all bonds; the old bonds and the new bonds was only $2,625,-053.71 (Exhibits, pp. 362, 363). Any remaining interest the present State of Virginia had already paid (Exhibits, p. 285-299).

For these reasons as well as those just stated in Class B it is necessary to determine the present value as of January 1, 1861, of the proceeds of investments received by Virginia in order to reach the setoff to be allowed to West Virginia upon principal if the court shall decide that such a setoff is proper and to be allowed.

A table showing present values as of January 1, 1861, of items Nos. 1, 2, 3 and 4 in Class C computed on the same basis as the Master has treated the other items in this class follows:

Present Value at Jan. 1, 1861, of Items 1, 2, 3 and 4 in Class C, page 12a E. Record, page 74. Master's Report.

1. Orange & Alexandria Railroad Co.			
Stock disposed of Oct. 28, 1872 (12a E.) for		$ 874,500.00	
Loan (Balance) " " " " " "		398,670.60	
Present Value at Jan. 1, 1861 of		$1,273,170.60	$ 744,544.21
2. Richmond & Danville Railroad Co.			
Stock disposed of as under (20 E.)		$1,085,636.57	
Dec. 13, 1870	$100,075.78	Present value at Jan. 1, 1861	$ 62,547.35
Aug. 31, 1871	934,924.29	" " " " " "	570,075.72

June 30, 1886	38,791.50	" " " " " "		15,332.61
Dec. 20, 1886	11,845.00	" " " " " "		4,626.95
	$1,085,636.57			$ 652,582.63
Loan paid as under (21 E.)			$ 438,900.00	
July 1, 1882	$292,436.41	Present value at Jan. 1, 1861		$ 127,701.49
Sep. 28, 1882	130,596.67	" " " " " "		56,658.00
July 8, 1884	15,866.92	" " " " " "		6,583.78
	$438,900.00			$ 190,943.27

3. RICHMOND & PETERSBURG RAILROAD CO.

Stock disposed of July 1, 1871 (23 E.)		$ 578,404.13	
Present value at Jan. 1, 1861			$ 354,849.16
Dividend Bond paid Nov. 7, 1861		$ 33,408.00	
Reduced to Gold @ $1.15		$ 29,050.43	
Present value at Jan. 1, 1861			$ 27,667.08

4. VIRGINIA CENTRAL RAILROAD CO.

Stock disposed of as under (25 E.)			$ 241,858.50	
Aug. 20, 1888	$ 25,500.00	Present value at Jan. 1, 1861		$ 9,604.52
Feb. 12, 1890	216,358.50	" " " " " "		78,819.12
	$241,858.50			$ 88,423.64

Note: Defendant's Exhibit No. 3, shows "Disposed of for" $231,458.58 which is 95.7% of the actual amount realized (see 25 E.)

Loan paid in 1871 (say Jan. 1) (26 E.)		$ 90,032.82	
Present value at Jan. 1, 1861			$ 56,270.51
Dividend bonds paid Jan. 17, 1863		$ 143,508.00	
Reduced to Gold @ $3.00		$ 47,836.00	
Present value at Jan. 1, 1861			$ 42,710.70

SUMMARY.		As Above.	Master's Report.
Orange & Alexandria Railroad Co.		$ 744,544.21	$ 972,342.60
Richmond & Danville Railroad Co.	$652,582.63		
	190,943.27	843,525.90	2,154,243.34
Richmond & Petersburg Railroad Co.	$354,849.16		
	27,667.08	382,516.24	474,534.40
Virginia Central Railroad Co.	$ 88,423.64		
	56,270.51		
	42,710.70	187,404.85	2,624,458.90
		$2,157,991.20	$6,225,579.24

SUMMARY—CLASS C.

PROCEEDS OF INVESTMENTS RECEIVED BY VIRGINIA.

Items Nos. 1-4 (from preceding table)	$2,157,991.20
Items Nos. 5-18 (from Master's Report)	977,031.41
Item No. 19 (see No. 19, Class C, Point Four, *supra;* Exhibits, p. 369)	13,607.11
Total	$3,148,629.72

CLASS D.

The amount of income collected by Virginia after June 20, 1863, which had accrued prior thereto, reducing Confederate payments to gold at the ratios set out in page 647 of the Original Record is $57,595.17 (Plaintiff's Exhibit No. 4A; Exhibits, pp. 373-374; see Point Four, Class D, *supra*).

CLASS E.

The present State of Virginia never received anything on account of her bank stocks. They perished with the Confederacy, hopelessly insolvent, utterly unable to pay creditors. The bank stocks received by West Virginia are grouped with the cash and other assets received by West Virginia and will be treated separately.

CLASS F.

The present value as of January 1, 1861, of the proceeds of investments listed in Class F is $204,688.42 (Master's Report, p. 98).

CLASS G.

Virginia never received anything for the investments grouped in Class G.

SUMMARY OF PROCEEDS OF ALL INVESTMENTS RECEIVED BY VIRGINIA.

Class A	$ 19,092.79
Class B	200,000.00
Class C	3,148,629.72
Class D	57,595.17
Class E	00.
Class F	204,688.42
Class G	00.
Total present value as of January 1, 1861, of all investments of undivided Virginia, received by present State of Virginia	3,630,006.10
Value of the investments received by West Virginia (Master's Report, p. 116)	541,467.76
Total of investments received by Virginia and West Virginia	4,171,473.86
Twenty-three and one-half per cent of the present value as of January 1, 1861, of the proceeds of all investments of the undivided State of Virginia, received by the present State of Virginia and West Virginia	980,296.36
Total of investments received by West Virginia	541,467.76
Twenty-three and one-half per cent of the proceeds of all investments of undivided Virginia less the value of the investments received by West Virginia	438,828.60

If the Court should hold that West Virginia is entitled to set off against the principal amount of her share of the debt of the old Commonwealth of Virginia, her claimed share of the investments of the old state the above amount of $438,828.60 represents the maximum to which she is entitled on account of such set off. It allows to West Virginia the full amount which Virginia received for the investments disposed of and the full value today of the Richmond, Fredericksburg & Potomac Railroad Company's stock now on hand. The set off is claimed against principal and the proceeds realized must therefore be discounted back to the time when interest begins to accrue.

INCOME RECEIVED BY VIRGINIA.

It is necessary to mention in this connection Defendant's Exhibit No. 12, 1861 (Exhibits, pp. 71-89), and Defendant's Exhibit No. 12, 1863 (Exhibits, pp. 227-240). The 1863 exhibit, if correctly made up would be an exact copy of pages 77-89 of the 1861 exhibit and its inclusion in the record like many other duplications of defendant's exhibits, only serves to multiply pages and increase expense. These exhibits purporting to show the amount of dividends and interest received by the State of Virginia, from January 1, 1861, to date were introduced by the defendant to relieve West Virginia from liability for interest. They have no materiality for this or any other purpose and are now referred to only to explain that Virginia did not receive over $6,000,000 of income as tabled at page 89 or approximately $5,000,000 as tabled at page 240. Both tables include an item of $764,925.48, repeated twice. In the total on page 89, the amounts listed at pages 84 and 85 aggregating the said sum of $764,925.48, are repeated twice. In the table at page 240 the items contained in pages 235-236, aggregating

said sum of $764,925.48, are repeated twice. There is also a double charge on pages 72, 73, 74 and 83 of dividends of banks aggregating $80,581.00 in the 1861 period, but this double charge does not appear in the 1863 table.

The 1861 schedule contains an item of income from the claim against the United States amounting to $592,761.22 (page 89), and the 1863 schedule gives this item at $552,952.72 (page 240). As explained by the Master in his report (Master's Report, pp. 67-70), Virginia never received any interest whatever on account of this claim.

The elimination of these errors reduces the total stated on page 89 to $5,183,637.46, and the total stated at page 240, to $4,142,850.23, as appears from the following table.

Corrections in Defendant's Exhibit No. 12.

Defendant's Exhibit No. 12 (pp. 71-89E).

1861.

1.	Total of pages 71-72 = (1861-2-3)	$ 878,871.84	
2.	" " " 73-74 = (1861-2-3)	368,099.50	
3.	" " " 75-76 = (1861-2-3)	427,249.61	
	Total prior to June 20, 1863, *included in following*	$1,674,220.95	
4.	Total of pages 77-83 Dividends 1863 onward	$3,812,668.75	
5.	" " " 84-89 Interest 1863 onward	2,809,236.41	
	Total of Defendant's claim		$6,621,905.16

RECONCILIATION.

Interest & Dividends received by Virginia:	$1,593,639.95	
Jan. 1, 1861, to June 20, 1863,	1,640,994.35	
June 20, 1863, to End of Confederacy	1,949,003.16	
After the Confederacy		$5,183,637.46
Difference		$1,438,267.70

composed of:

Double charge p. 72 & 83 Bank of Virginia	29,382.50
73 & 83 " " "	7,423.50
74 & 83 Exchange Bank	1,335.00
74 & 83 " "	42,440.00
Pages 84 & 85 included total on Page 89 twice	764,925.48
	$ 845,506.48
Interest on U. S. Government Claim Page 89	592,761.22
	$1,438,267.70

Defendant's Exhibits No. 12 and 13 (pp. 227-240E).

1863.

1.	No parallel in this Exhibit			
2.	" " " " "			
3.	" " " " "			
4.	Total of pages 227-234	Dividends 1863 onward	2,565,697.41	
5.	" " " 235-240	Interest 1863 onward	2,342,178.30	
	Total of Defendant's claim			4,907,875.71
	Dividends actually foot		$2,565,697.41	
	Interest actually foots		1,577,252.82	
				4,142,950.23
	DIFFERENCE, Pages 235 & 236 footed in twice			$ 764,925.48
	Interest on U. S. Government Claim Page 240			552,952.72
				$1,317,878.20

This total on page 89 in Defendant's Schedule No. 12 includes $1,593,639.95 of income collected by the old State of Virginia between January 1, 1861, and June 20, 1863, which is no more a charge against the present State of Virginia than it is a charge against West Virginia. If it were a charge payments made in Confederate money would have to be reduced to gold and so reduced would aggregate only $974,782.55 and the present value of this sum as of January 1, 1861, is $917,293.32.

The interest and dividends received after June 20, 863, until the end of the Confederacy April 1, 1865, gate $1,640,994.35. These payments were all re- d in Confederate money and reduced to gold have value of only $89,354.85 and their present value as of January 1, 1861, is only $75,582.75.

The interest and dividends received after April 1, 1865, amount to $1,949,003.16 and their present value as of January 1, 1863 is only $818,795.94.

(A)	Interest and dividends received by Virginia Jan. 1, 1861 to June 20th	$1,593,639.95
	Reduced to gold	974,782.55
	Present value at Jan. 1, 1861	917,293.32
(B)	Interest and dividends received after June 20th to end of confederate period (April 1, 1865)	$1,640,994.35
	Reduced to gold	89,354.85
	Present value at Jan. 1, 1861	75,582.85
(C)	Interest and dividends received after the Confederate period (April 1, 1865)	$1,949,003.16
	Present value at Jan. 1, 1861	818,795.94

Total present value:	
B	75,582.85
C	818,795.94
	$894,378.79

The total present value as of January 1, 1861 (reducing Confederate money payments to gold) of all the income received by the present State of Virginia from the time of the dismemberment of old Virginia until the present time, aggregate $894,378.79. Twenty-three and one-half per cent is $210,179.01.

We have already stated that these schedules of West Virginia are not material for the purpose of relieving her in any decree from liability for interest. If they were material the foregoing figures show that they would relieve her from interest upon $210,179.01 only of her share of the principal debt and not upon her whole share of principal as West Virginia contends.

POINT SIX.

Even if West Virginia should be found entitled to 23 1/2 per cent of the value of the assets claimed by West Virginia, in no event would this reduce the amount of West Virginia's share of the principal sum heretofore determined because Virginia subsequent to January 1, 1861, from her separate and individual resources or from the proceeds of the assets in question paid off obligations of the undivided state for which West Virginia was liable as to her share to an amount far in excess of the value of the assets received by Virginia. Virginia is entitled to use and apply the investments held by her and the value or the proceeds thereof to the payment of the obligations of the undivided Commonwealth of Virginia.

(The bondholding Creditors' twelfth exception.)

From plaintiff's Exhibit 1 (Exhibits, pp. 286-8) it appears that between January 1, 1861, and December 31, 1871, Virginia paid out $7,094,103.61 on account of interest on the common debt and that prior to 1871 she issued her bonds in the sum of $6,576,913.60 in payment of interest due upon the bonds of the undivided State upon which West Virginia is jointly

liable with Virginia (Plaintiff's Exhibit No. 1, Exhibits, p. 288 and Plaintiff's Exhibit No. 5, Exhibits, p. 375). The total of these payments in cash and bonds for interest upon the undivided debt amounts to $13,671,017.21. The common debt as heretofore admitted and determined in this case included $977,209.89 of accrued interest from July 1, 1860, to December 31, 1860. To avoid a possibility of duplication of charge this amount is deducted from the said total subsequent payments by Virginia, leaving $12,693,807.32 of interest upon the joint debt accrued since January 1, 1861, and since paid by Virginia alone and no part of which is included in the debt as to which West Virginia's share has been fixed. West Virginia asserts that Virginia scaled these bonds under her various Funding Acts. It appears from Plaintiff's Supplemental Exhibit No. 1a (Exhibits, pp. 296-299), that if Virginia had taken advantage of all of her Funding Acts as to all of these bonds issued for interest, she would have paid out by the smallest possible calculation $9,907,029.95 on account thereof. It cannot be denied that the payments for interest made in Virginia during the war were in Confederate money. Payments for interest for bonds held abroad were made in gold, but there is no way at this time of separating such payments for interest from those made in Virginia, and all payments for interest between January 1, 1861, and April 1, 1865, have been reduced to gold on the basis of the table for Confederate money as contained in the original record at page 647. This reduces the gold value of the cash payments for interest on the common debt made by Virginia from $7,094,103.61 to $4,836,397.48, and the total payments for such interest in cash and bonds to $10,436,101.19; after also deducting the $977,209.89 of accrued interest to December 31, 1860.

In addition to these payments for interest it appears

from Plaintiff's Supplemental Exhibit No. 1 (Exhibits, pp. 289-295) that Virginia issued her bonds in the sum of $1,509,150.02 on account of debts of the undivided State existing prior to January 1, 1861. The same exhibits shows that $1,008,160.38 of these bonds were issued to pay for internal improvements contracted for by the old State of Virginia prior to January 1, 1861, and $270,570 thereof were exchanged for James River and Kanawha Company's bonds guaranteed by the undivided State and for which the undivided State was liable. Other bonds went to pay interest on the bonds of the James River and Kanawha Company and the Chesapeake & Ohio Canal Company guaranteed by the old State and dividends on the old James River and Kanawha Company's stock for which the undivided State was liable. These payments aggregate $1,451,492.01. The remaining $57,658.01 represents payments on account of interest to the Literary Fund. It has heretofore been determined in this case that the Literary Fund is not a separate corporation, but a part of the State of Virginia and the payments to it therefore are not a proper charge against West Virginia. Disregarding these payments it appears that subsequent to January 1, 1861, Virginia issued her bonds under loans Nos. 90, 91 and 93 (described in original record, Joint Exhibit A1), in the amount of $1,451,492.01 in payment of obligations of the undivided State for the same amount outstanding on January 1, 1861. These unfunded debts were a part of the outstanding debt of the undivided State as of January 1, 1861, and should have been included therein. Even if it should be determined that West Virginia is otherwise entitled to her share of the fair value of the assets, she cannot receive any credit against Virginia on account thereof until the fair value of the assets exceeds the amount expended by Virginia on account of the obligations of

the old State for which West Virginia is jointly liable with her.

We have shown these joint debts owing on January 1, 1861, paid by Virginia at a like cost to her to amount to $1,451,492.01 and that interest on the common debt accrued since January 1, 1861, amounting to $12,693,807.32 was paid by Virginia at a cost to her on a gold basis of $10,436,101.19, making a total of $11,887,593.20. To this is to be added $2,218,-319.81 for interest after January 1, 1872, on bonds issued by the present State of Virginia in exchange for the old unfunded bonds of the undivided State for which Virginia issued her bonds in full (Exhibits, p. 419). It is true that these bonds are held by educational institutions within the bounds of Virginia, but they are separate corporations, and the bonds originally held were a part of the admitted debt for which West Virginia is legally bound to pay her share. West Virginia will not be heard to say that Virginia might in the case of these institutions have issued her certificate for one-third as in the case of other holders. Virginia like any other surety has the legal right to discharge the obligation when due, and look to West Virginia therefor. Adding this amount to the previous total gives a sum of $14,105,913.01, representing payments of common debts for which West Virginia and Virginia are each liable in the proportion of their respective shares, and no part of which is included in the common debt as heretofore determined. As Virginia has discharged common obligations separate and distinct from and in addition to the common debt as heretofore determined she will not account to West Virginia for West Virginia's share of the fair value of the assets unless the fair value of the assets exceeds the amount of her expenditures for common obligations and then only to the extent of that excess.

POINT SEVEN.

West Virginia's claim if proved will not reduce the amount owing by West Virginia for either principal or interest in any degree. West Virginia's equitable proportion was determined on the basis of the ratio of the total wealth of the two states. It is immaterial what proportion of the wealth of either state was held in common by the state or in separate ownership by individuals, or what proportion of the wealth of either state was created by the proceeds of the common debt.

This principle has already been decided in this case in its application to West Virginia. The bill alleged and the proof on the previous hearing showed that West Virginia received a part of the common assets at the time of her creation as a separate State for which she promised to account in the settlement thereafter to be made. The Court said:

> "As West Virginia gets the benefit of this property without an accounting, on the principles of this decision it needs not to be mention in more detail" (220 U. S., 1).

If West Virginia gets the benefit of the property she received without an accounting on the principles of the decision it follows that Virginia is entitled to the same benefits with relation to the property she retained. This determination of the court is in ac-

cord with sound reasoning. States cannot be divided according to the principles which govern the dissolution of a private partnership. Large questions of public policy are involved. The creditors loan their money on the faith and credit of the character of all the people and all the wealth of the undivided State. It is not just to them to say that they shall look for the satisfaction of their claims to the wealth of the people that received the proceeds of the debt.

Even the principles governing the dissolution of a private partnership would not support West Virginia's claim. Assume a partnership between A and B with equal shares, and an indebtedness of $1,000. A receives assets valued at $1,000 purchased with the proceeds of this indebtedness, and B receives assets valued at $1,000 purchased with other partnership assets. The debts of the partnership would be apportioned equally between A and B according to their share in the partnership, and would not fall exclusively upon A, who has received all the assets purchased with the proceeds of the indebtedness. It is impossible to determine the separate value accruing to either West Virginia or Virginia because of the creation of these assets or because of other State expenditures made within the present bounds of each. The assets were created by the votes of all the people of the undivided State, and the record on the previous hearing discloses that a very large sum had been spent on public improvements within the bounds of West Virginia (original Master's Report, paragraph III, pp. 83-86, and references cited therein). At all events West Virginia with the aid of these public improvements in Virginia and in West Virginia has been able to grow and develop until in 1908 the total assessed value of her property was nearly a billion dollars while the total assessed value of Virginia as of the same date was only two-thirds of that sum.

Upon the basis of the contention made by West Virginia if the figures presented by West Virginia at the recent hearing in Richmond represented actual values instead of merely "Claims of West Virginia for consideration in settlement of debt as set up in Hillman Exhibits" the entire burden of this debt would fall upon Virginia, and the creditors would receive nothing from West Virginia, although at the time of the creation of West Virginia as a separate State, she had a third of the white population, over a third of the territory and twenty-three and one-half per cent of the total wealth of the undivided State, and has grown in wealth and prosperity in the meantime until in 1908 her total assessed wealth exceeded that of Virginia by nearly fifty per cent. Such a contention is so unfair, unjust and unequitable that it discredits the method by which the result is attained.

It will not be disputed that West Virginia is not entitled to offset the value of these assets against her share of the common debt unless West Virginia could now successfully assert a claim against Virginia to recover a sum representing such value.

Assume that there was no common debt and that West Virginia was now suing Virginia to establish the claim asserted here. It would be a complete answer upon Virginia's part to say that upon the division of the State the fixed physical property formerly owned by the undivided State is owned by the new State in which it is located. The fact that the property right of the old State was represented by shares would make no difference in this regard. The property right in the shares follows the right to the fixed physical property. This is the purport of the statute passed by the General Assembly of the Restored State of Virginia, February 3, 1863, as set out in paragraph VIII of the bill. Such a statute if passed

by West Virginia alone would have been constitutional. The ownership of the fixed physical property in West Virginia formerly owned by the undivided State vested by the division in the State of West Virginia. Such a statute would not have been constitutional if the new Virginia's rights therein still remained. The same is true of the assets remaining in Virginia. After the separation West Virginia is as powerless to assert property rights or claims on account of the public property remaining within the bounds of the present State of Virginia, as Virginia was powerless to assert a claim on account of the public property which West Virginia received. There is no rule of public law that where a State divides into two States the public property should be apportioned according to the wealth of the respective States. The public property belongs to the new State in which it is located. This rule is not changed because the public property may have been created by the proceeds of the public debt instead of from funds raised by taxation or otherwise. West Virginia could not have asserted an independent claim against Virginia on account of these assets. Her claim for set off rests upon the same principle and fails for the same reason.

POINT EIGHT.

The terms upon which West Virginia was admitted into the union are all set out in the contract evidenced by the three documents (220 U. S., 28) viz; the Constitution framed for West Virginia, the act of Virginia consenting to the creation of the new state and the act of Congress admitting the new state. Neither this Court or the Congress can add one term or condition now to that contract.

The material terms of the contract are all expressed in the Constitution framed for West Virginia. The eighth section of the VIII article is the vital feature. The only question asked in Congress during the debate on the admission of the State was "Has provision been made for the payment of the public debt of Virginia?" This was answered in the affirmative and the 8th Section of the VIII article referred to.

The only provision made in the contract between Virginia and West Virginia as evidenced by the three documents was that West Virginia should assume an equitable proportion of the public debt prior to January, 1861. Nothing was said or intimated as to Virginia's being held accountable for any part of the public improvements that remained within her borders.

The Master in his report, page 10 of his report, has said, however:

> "West Virginia's rights do not depend upon any title that she acquired to assets solely

> owned by Virginia, as to which she did not and could not acquire any title, but they do depend upon the agreement of Virginia to account for these assets or investments at their fair value upon the date when the amount of the debt is to be ascertained."

We have elsewhere commented upon this statement and have challenged the production or reference to one word in this record that gives countenance or support to it. We now deny that any such agreement on the part of Virginia exists or ever did exist. The eighth section of the VIII article of the Constitution of West Virginia contains all that was ever agreed to by Virginia or ever proposed on behalf of Virginia.

Yet it is on this false assumption that the conclusion reached by the Master, that Virginia is liable to account to West Virginia for any proportion of the value of the property that remained within her borders rests. It is only on the assumption that Virginia had agreed to become responsible for these assets that she can be held liable for their value now.

The partition of Virginia by the creation of this new State within her territory was an act of the Federal Congress alone. Congress might have provided such terms as it saw fit.

> Pollard v. Hagan, 3 Howard, 229.
> Strader v. Graham, 10 Howard, 82.

But even as to such conditions as Congress might impose, if the State was admitted by Congress into the Union, under a Constitution which disregarded or violated such conditions it would then be too late for Congress to undo the Act of admission, or seek to enforce the prescribed conditions. The Ordinance of 1787 prescribed that the territory granted by Virginia to the United States, should not be divided into more than five states and should not allow slavery to

exist within those states. It was held repeatedly by this Court that these conditions were without effect in any State formed out of the Northwestern territory unless re-enacted by such State.

Permoli v. First Municipality, 3 Howard, 610.

This Court is without the power to add anything to the agreement of Virginia. It is without the power to make Virginia responsible for the debris of the work of internal improvements that were left within her borders when West Virginia was created, and separated herself from Virginia. It is without the power to diminish the amount already ascertained and determined of West Virginia's liability for her proportion of the principal debt by deducting therefrom any amount on account of West Virginia's share of the alleged "assets."

When West Virginia was created and admitted into the Union, Virginia consented to it upon the terms stated in the Constitution then framed for West Virginia, and upon no other terms. The tripartite contract was entered into and the final act was done upon the status that then existed. Certain parts of the internal improvements that then existed—unfinished and incomplete remained in West Virginia and certain other parts remained in Virginia. West Virginia knew of this and tacitly agreed that the status then existing should remain. The debates in the Virginia Convention of November, 1861, and the debates in Congress on the question of the admission of the new State are all extant and have been repeatedly referred to during the pendancy of this cause. In none of these debates nor in the contemporaneous discussions was it at any time ever hinted or claimed that Virginia should be held responsible as trustee or as bailee for any part of these works that remained within her limits.

It appears that this Court, in the opinion delivered in Virginia vs. West Virginia, 220 U. S., on pages 29-30, used the expression "The whole State would have got the gain and the whole State must bear the loss, as it does not appear that there are any stocks of value on hand."

This expression was seized upon by West Virginia as justifying the filing of the supplemental answer in which for the first time in fifty years are set up and asserted the claims made in that answer in which it is charged that there were "stock of value on hand" amounting to many millions of dollars. It was objected that the filing of this supplemental answer should not be allowed because it appeared that all of the items constituting the new claim had been already shown in evidence and that they might have been used by West Virginia for the purposes of set off when the case stood on the pleadings or when it was before the master in 1910. The master in his report says as to this:

> "The issue of these assets, or 'investments' as they are called in the opinion of the Court, *and their value as elements of setoff in favor of West Virginia*, was not submitted in any of the proposed findings. * * * Such investigation is therefore now prosecuted for the first time. So far as the various items were referred to they were referred to for an entirely different purpose in the main."

The items however were referred to for some purpose and might have been referred to for the present purpose had West Virginia then seen it was for her interest to do so.

They are referred to now for the purpose of presenting a new and entirely different case from that on which the Court was then called on to act. Had the partition of Virginia been effected by a Court of

Equity in a suit for partition such Court by its decree might have provided for an *owelty of partition* by requiring one joint tenant who had allotted to him a share greater in value than the share allotted to his co-tenant, to pay to his co-tenant an amount in money to equalize their shares. But this was not the work of a Court of Equity. The partition here was effected by a political department of the government. It may be true that Congress was guided and controlled in some measure by the contract of the parties.

That contract made no provision for anything more than the partition of the State on the terms stated in the Constitution framed for the new State. That contract in none of its parts, made any provision for requiring Virginia to account for the value of any public property left by the partition within her borders. It did not provide for and hence it did not contemplate that the interests of the two partners should be equalized or harmonized by contributions from either to the other in the nature of owelty of partition.

It defined the geographical boundaries of the new State by indicating the counties which should compose such State. In the Congress that enacted the law for the admission of the new State, the only question asked was "Has provision been made for requiring the new State to bear a proportion of the public debt." Nothing was said in the Constitution framed for the new State as to requiring Virginia to account for the property of the old State left within her borders.

West Virginia from all that appears in contemporary utterances by her or her people, or in the debates in Congress was satisfied and well content to obtain her separate existence with such of the public property as she then had in her possession without having any regard to the debris of the work of public improvement that remained within the limits of Virginia.

And this notion of treating Virginia as a Trustee or a Bailee of such property and holding her to an accounting therefor was never suggested or dreamed of until the year 1914, fifty-one years after the State of West Virginia was created, and more than eight years after the pleadings in this cause had been completed and after the proof had been taken when it found birth in the supplemental answer filed in 1914.

There was good reason why the people of West Virginia did not in 1863 assert any such contention. It is charged in the bill, Section 111, Original Record, page 5, that

> "it will appear from an inspection of the legislative records of the State, where the vote carrying the appropriations for such public improvements was recorded, that in nearly every instance a majority of those members of the House and Senate of the original State, who then represented the counties now composing West Virginia, voted for such appropriations. Indeed it appears from those records that a great majority of the Acts of the Legislature of Virginia under which said indebtedness was created, would have failed of their passage, had the representatives from the counties embraced in what is now West Virginia opposed their enactment, and that a very large proportion of said indebtedness was actually contracted over the votes of a majority of the representatives from the counties and cities embraced in the limits of the present State of Virginia."

This strong charge is not denied in the answer of West Virginia but indeed is there admitted (Record, p. 145).

This Court in this case under the present pleadings is without power to treat this as a proceeding for partition and compel contribution from Virginia to satisfy a demand against her for property in which West Virginia claims to have an interest.

POINT NINE.

Interest.

It has now been admitted, found by the master and adjudged by the Court that the public debt of the Commonwealth of Virginia prior to January 1, 1861 was $33,897,073.82. Of that public debt West Virginia assumed an equitable proportion by her Constitution under which she was admitted into the Union. It has been decided that that Constitution and the Act of Virginia giving her consent and the Act of Congress admitting the state, these three documents, form a contract, the terms of which are expressed in these three documents. It has been declared by this Court (the contrary could not be affirmed) that this public debt was "represented mainly by interest bearing bonds" (220 U. S., 27).

It was that public debt so represented of which West Virginia assumed an equitable proportion. She would now insist, if she could that it was only of the principal and not of the interest that she assumed a proportion. She will not be heard however willing she may be to so affirm.

These "interest bearing bonds" existed in January 1861, and continued to exist in June, 1863, when West Virginia came into actual being and they exist today. The interest except so far as it has been satisfied or redeemed or become extinct by the maturity of the bonds still continues to run. This Court has said (220 U. S., 36), and West Virginia has been invigorated by the utterance:

> "Wherever the responsibility for the delay might ultimately be placed, or however it might be shared, it would be a severe result to capitalize charges for half a century—such a thing hardly could happen in a private case an-

> alogous to this. Statutes of limitation, if nothing else, would be likely to interpose a bar."

We do not ask so much.

Something is sought to be made of the word "equitable." It has been argued with seeming gravity that the word involves the exercise of the duties of a chancellor—a weighing of equities, etc. The gravity should relax when it appears that the chancellor on whom the delicate duty was placed was the legislature of West Virginia. Further explanation is needless.

In Tilson vs. United States (100 U. S., 43-46), an Act of Congress directed the Court of Claims "to ascertain, determine and adjudge the amount *equitably* due said firm, if any, for such loss and damage." The Court, however, said:

> "To our minds the word 'equitably' as here used means no more than that the rule of law applicable to the case shall be construed liberally in favor of the claimant."

So in McClure v. United States, 116 U. S., 149.

(a) *West Virginia is liable for interest.*

The Court has held this is a suit on a contract.

It is in fact a suit for the specific performance of a contract made for the benefit of a third party. The contract is set forth in Section 8, Article VIII, of the West Virginia Constitution, upon which West Virginia was admitted in the Union. It is as follows:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing in-

terest and redeem the principal within thirty-four years."

West Virginia is liable for interest by the express terms of this paragraph. As West Virginia is speaking, the clause will be construed most strictly against that State. The public debt of the Commonwealth of Virginia prior to the first day of January, 1861, consisted almost wholly of interest-bearing bonds and the balance of the debt was accrued interest on those same bonds. If the accrued interest prior to the first day of January, 1861, was a portion of the public debt, how is it possible to say that the accruing interest was not.

The Court has made plain that this promise of West Virginia is only the expressed recognition of a deep-seated equity for which she was already liable. The Court in its decision of March 6, 1911 (220 U. S., 1), said as follows:

> "The liability of West Virginia is a deep-seated equity, not discharged by changes in the form of the debt, nor split up by the unilateral attempt of Virginia to apportion specific parts to the two States."

If there had been no contract in West Virginia's Constitution, West Virginia would have been equally liable for her equitable proportion of the debt. It will not bear the light of reason to say that, as to Virginia's share, after the dismemberment of the old State, the bondholding creditors of the old State would be entitled to receive interest upon the bonds according to their tenor; but upon West Virginia's proportion thereof, the same creditors holding the same bonds would not be entitled to receive their interest. The equitable obligation falling upon each State to pay its share of the undivided debt is contractual and not tortious. West Virginia is just as liable for her share of these bonds according to the tenor of the bonds as Vir-

ginia is liable for her proportion. The fact that West Virginia acknowledged her liability in her constitution, and promised to Virginia to discharge that liability, while it adds another form to West Virginia's obligation does not change its substance. It certainly does not change the substance of that obligation to diminish it. Suppose West Virginia, for a sufficient consideration, had assumed the whole debt, would she be heard to say that, while she was liable for the principal of the bonds, the interest upon them, according to their tenor, was not for her to pay. She proposed, in Section 8, Article VIII, to provide a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years. This shows that both West Virginia and Virginia had in mind, and that Congress had in mind, her liability for the interest as well as for principal.

West Virginia concedes that she is liable for the accrued interest. There is no term which determines the liability for interest which had accrued, different or additional to the terms which fix the interest to accrue after January 1, 1861. Suppose we give our promissory note to X for $1,000, payable in one year, with interest at 6 per cent; in six months from now Y comes along and assumes our obligation. Does not Y by that act contract to pay the accruing interest just as much as he contracts to pay the interest which has accrued? In this respect West Virginia is no different from any individual. This was an obligation for interest as well as for principal. The question of whether a State is liable for interest except where she expressly promises to pay it does not arise because West Virginia promised. Only *ex contractu* obligations of a State are enforced in this Court.

United States vs. North Carolina, 136 U. S., 211.

South Dakota vs. North Carolina, 192 U. S., 286.

In this case our right to interest is based upon West Virginia's promise to pay it.

In the brief filed on behalf of Virginia upon the argument on the merits after the master's report, West Virginia's liability for interest was very fully discussed (Va.'s Brief, pp. 94-97), and it was there shown to be the law of Virginia that interest is incident to the obligation and, even though not expressed in the contract, is an inherent part of it.

> "Under the law of Virginia as repeatedly adjudicated by her highest court, the interest is incident to the obligation, and whenever a debt is due, the debtor is bound to pay interest unless relieved from this obligation by agreement. This is, and has been the law of the Commonwealth for more than one hundred years.
>
> "In Jones vs. Williams, 2 Call., 106, decided in 1799, Edmund Pendleton, who was one of the great judges of our country, delivering the opinion of the Court said:
>
> "Interest is allowed because it is natural justice that he who has the use of another's money should pay interest for it."
>
> "Cited with approval in Baker vs. Morris, 10 Lehigh, 284; McVeigh vs. Howard, 87 Va., 599, and Stuart vs. Hurt, 88 Va., 343.
>
> "In Hatcher vs. Lewis, 4 Randolph, 152, 147, the Court laid down the rules in the following expressive language:
>
> " *'The interest follows the principal as the shadow does the substance.'*
>
> "In Chapman vs. Shepherd, the Court said:
>
> " 'In contracts for the payment of money, interest is not given as damages at the discretion of the Court, or jury, but as an incident to

the debt, which the Court has no discretion to refuse.'

Chapman vs. Shepherd, 24 Gratt., 377, 384.
Roberts vs. Cocke, 28 Gratt., 207.
Tidball vs. Shenandoah National Bank, 100 Va., 741.

"Interest is favored both by the legislative and judicial bodies of the State."

"Tazewell vs. Saunders, 13 Gratt., 354, 370.

"In McVeigh vs. Howard, 87 Va., 599, the Supreme Court of Appeals of Virginia said:

" 'It is the settled rule that when no day is named in the bond or note given for the payment of a precedent debt, it is due and payable on the day of its date, and bears interest from that date, though no interest be reserved. Such an instrument like a bond or note payable, in Virginia, on demand, is payable presently, and bears interest from date. This doctrine is founded in good conscience and correct morals.' * * *

"Citing Jones vs. Williams and Hatcher vs. Lewis, quoted above.

"Such is the law of Virgina as to interest.

"*The law of West Virginia in regard thereto is the same.*

"In Shipman vs. Bailey, 20 W. Va., 140, 146, Judge Snyder, announcing the unanimous opinion of the Supreme Court of Appeals of that State, after citing a number of authorities upon the question, stated the rule as follows:

"Other authorities of the same character might be cited, but, we think, we have given sufficient to establish the rule which seems to be, that in contracts for the payment of money interest on the principal sum is a legal incident of the debt and a part of the contract, and wherever there is a contract for the payment

of a special legal rate of interest, whether such rate is fixed by the contract itself or by the law of the place where the contract is made, the obligation of the contract extends to the payment of such interest as fully as it does to the principal sum, and Courts have no more power to change the rate of interest thus fixed, than they have to dispense with the enforcement of the contract either in whole or in part.'

"That decision reaffirms another proposition, applicable to this case, already a part of the jurisprudence of West Virginia, by the adjudications of the Supreme Court of Virginia rendered before the birth of the new State, namely that the *lex loci contractus* controls in the matter of the interest chargeable against a debtor.

"In Pickins vs. McCoy, 24 West Va., 344-352, the Court affirms Shipman vs. Bailey, and adopts the language just quoted from that decision.

"Independently of these West Virginian decisions, such parts of the common law and of the laws of the State of Virginia as were in force on the 20th of June, 1863, when the first Constitution of West Virginia went into operation, and as are not repugnant to said Constitution, were continued and declared to be the law of West Virginia. Section 8 of Article XI of the first West Virginia Constitution. And see present West Virginia Constitution.

"The effect of this provision was to adopt for the new State the body of the common and statute laws of the Commonwealth, so far as the same were in force within the boundaries of the new State on the 20th of June, 1863.

"As a part of this body of laws, the law of Virginia as to interest became, and has continued to be, a part of the laws of West Virginia.

"Such, then, was the law of Virginia before, at the time of and since the formation of West Virginia, as to the legal and equitable liability

of a debtor or contractor to pay interest. Such has been the law of West Virginia since the hour of her birth. And such was, and is, the law of the contract evidence by the public acts of Virginia and West Virginia set forth in complainant's bill.

"This is the rule in Virginia as to debts due by the Commonwealth.

"The question was presented in the celebrated case of Higginbotham's Executrix vs. Commonwealth, 25 Gratt., 627.

"That was a suit against the Commonwealth to recover the amount due Higginbotham's executrix on certain past due dividends on stocks which had been guaranteed and assumed by Virginia by the acts cited in the opinion of the Court—26 Gratt., 630, 631.

"There was no express contract by the State to pay interest upon said dividends. The petitioner's claim was for the amount of the dividends 'with its accruing interest.'

"The unanimous decision of the Supreme Court of Virginia was that 'judgment should be entered for the petitioner for the amount of her demand with interest'" (*idem*, p. 641). (Va.'s Brief, pp. 94-97.)

North Carolina was not held liable for interest which she did not expressly promise to pay. In that State interest, unless expressly promised, is not an inherent term of the contract, but is imposed as damages for failure to keep the promise. If by the law of North Carolina the State was charged with interest, whether she expressly promised it or not, the decisions in the above cases would have been otherwise. Under the cases cited in brief of Virginia, West Virginia is liable for interest upon her share of the debt down to the present time even if she had not expressly promised to pay it. If West Virginia had made no express promise about her debt under the law as laid down in the cases in Virginia's brief West

Virginia would be liable for interest from January 1, 1861, up to the present time. *But we do not ask so much.*

West Virginia's liability for interest rests upon her promise in her Constitution; recognizing the deep-seated equity imposed by her action of separation: to pay her proportion of the debt, principal and interest, to the date of maturity of the various bonds according to their tenor.

(b) *The amount of interest which West Virginia legally owes is* $14,174,425.64.

This interest is computed upon West Virginia's share of the bonds outstanding January 1, 1861, according to their tenor (Exhibits, pp. 386-392).

An examination of Plaintiff's Exhibit No. 9 (Exhibits, pp. 386-392), shows that many of these bonds are redeemable at the pleasure of the General Assembly and draw interest until redeemed.

The six per cent registered bonds redeemable at the pleasure of the General Assembly, outstanding in the hands of the public, after deducting all bonds held by the Board of Public Works, the literary fund and the sinking fund amount to $8,957,271.03 and West Virginia's proportion thereof is $1,898,941.46.

The five per cent bonds redeemable at the pleasure of the General Assembly outstanding in the hands of the public, after deducting all bonds held by the Board of Public Works, the literary fund and the sinking fund of Virginia amount to $262,000.00 and West Virginia's proportion thereof amounts to $55,544.00.

The James River stock annuity shown in the master's report to amount to $95,500.00, in the hands of the public, after deducting all bonds held by the Board of Public Works, and the literary fund and the sinking fund of Virginia, was not evidenced by any form

of certificate of debt, prior to January 1, 1861, but that figure is the principal amount required to produce annually at six per cent the sum guaranteed forever to the stockholders of the James River Company, and this treatment of the annuity was approved by West Virginia's accountant in joint Exhibit A1 and acquiesced in by West Virginia. West Virginia's proportion of this annuity is $20,246.00.

The bonds are collected in eight groups. The six per cent and five per cent registered bonds, redeemable at the pleasure of the General Assembly, and the James River stock annuity comprise groups 1, 2, and 3, respectively. West Virginia's share of the bonds in these three groups amounts to $1,974,731.46, being much less than one-third of the total principal for which she is liable. This Court has decided that no portion of the debt is extinguished, and there is no reason why on this proportion of West Virginia's share she should not pay interest to date. On any basis of computation she is legally bound to do so. This is offset by the fact that in the case of the remainder of her share she does not pay interest at all on some of the bonds and on the others pays interest to periods which end from 1886 to 1894.

The bonds in group 4 were created under an act of March 16, 1838, and were redeemable in twenty years, so no interest is charged upon West Virginia's share of this group.

The bonds in group 5 are 6 per cent registered bonds redeemable in 34 years. They were created under acts passed March 23, 1860; March 17, 1856; March 18, 1858, and March 29, 1851. The bonds issued under the act of March 23, 1860, would mature 34 years thereafter, to wit, March 23, 1894, and no interest on West Virginia's share of these bonds is figured subsequent to that date; the bonds issued under the act of March 17, 1856, would mature 34 years thereafter, to

wit, March 17, 1890, and no interest on West Virginia's share of these bonds is figured subsequent to that date; the bonds issued under the act of March 18, 1858, would mature 34 years thereafter, to wit, March 18, 1892, and no interest upon West Virginia's share of these bonds is figured subsequent to that date. The bonds issued under the act of March 29, 1851, would mature 34 years thereafter, to wit, March 29, 1885, and no interest upon West Virginia's share of these bonds is figured subsequent to that date.

No interest is computed prior to January 1, 1861, because the unpaid interest up to that time is found by the Master and accepted by West Virginia as a part of the debt existing upon that date.

The bonds in group 6 are 6 per cent coupon bonds redeemable in 35 years, issued under the act of March 29, 1851, and interest upon West Virginia's share of these bonds is figured to March 29, 1886, being 35 years after March 29, 1851, the date of the act under which they were authorized.

The bonds in group 7 are 6 per cent registered bonds redeemable in 35 years. These bonds were issued in exchange for coupon bonds under act of March 18, 1856, but as these coupon bonds, for which the registered bonds were exchanged, were issued under the act of March 29, 1851, as shown in group 6 we figure the maturity as 35 years after this prior date of March 29, 1851, being March 29, 1886.

The bonds in group 8 are 5 per cent Sterling coupon bonds redeemable in 35 years, issued under the act of March 29, 1851, and interest upon West Virginia's share of these bonds is figured to March 29, 1886, being 35 years after March 29, 1851, the date of the act authorizing the issue. Adding together the interest chargeable against West Virginia on the bonds in each of these 8 groups here listed the whole interest is

found to be $14,174,425.61. This sum is only about two-thirds of the interest for which she would be liable upon a strict enforcement of the full measure of her liability.

Adding to West Virginia's share of the interest as here computed her share of the principal, the total amount of West Virginia's liability is $21,356,933.10 (Exhibits, p. 392).

(c) *If West Virginia should pay principal and interest upon her proportion of the debt in the same pro rata amount which Virginia has paid upon her proportion, or if West Virginia should scale both principal and interest in the same way that the various funding acts of Virginia provided, or if West Virginia should pay interest for 34 years as provided in her constitution the amount would be more than the amount we ask for.*

The figures to substantiate these deductions are contained in Plaintiff's Supplementary Exhibit No. 9 (Exhibits, pp. 393-397).

Plaintiff's Exhibit No. 22 (Exhibits, pp. 429-430), shows that the amount paid off by Virginia between January 1, 1861, and September 30, 1913, or assumed or carried by her on account of the old debt of the undivided State amounts to $77,857,885.74. This schedule shows that Virginia's then existing interest-bearing debt on this account amounts to $24,645,075.23.

If West Virginia does as well by the old bondholding creditors upon her share as Virginia has done with her share, West Virginia will pay $23,917,086.06.

If West Virginia paid interest for 34 years as her constitution bade her legislature to provide, West Virginia would pay $21,681,432.96.

If West Virginia settled her proportion of the debt on the basis of the 1871 and 1892 Funding Acts of Virginia, she would pay $27,658,334.22; if West Virginia settled her proportion of the debt on the basis of the 1871, 1879 and 1892 Funding Acts of Virginia she would pay $21,638,059.08; if West Virginia settled her proportion of the debt on the basis of the 1892 Funding Act of Virginia alone she would pay $21,885,124.39. If West Virginia settled her proportion of the debt on the basis of the 1871, 1882 Refunding Acts of Virginia she would pay $27,151,223.02. If West Virginia settled her proportion of the debt on the basis of the 1871, 1879 and 1882 Refunding Acts of Virginia she would pay $19,776,876.07 (Plaintiff's Supplementary Exhibit No. 9; Exhibits, pp. 393-397).

These Refunding Acts of 1879 and 1882 of Virginia have sometimes been referred to as a partial repudiation, and still on the basis of these acts West Virginia would pay as her share nearly twenty million dollars if she should have the benefit of both the acts of 1879 and 1882, taken together, applied to all of her share of the debt.

(d) *The efforts of Virginia to settle the controversy and West Virginia's excuses for failure to meet Virginia.*

West Virginia's admission of the facts bearing upon this portion of our argument are contained in pages 444-472, inclusive, and 490-496, inclusive, of West Virginia's Appendix to the West Virginia's Compilation, Vol. I, and paragraph XI of her original answer, and pages 12-20, inclusive, of her brief upon the hearing after the original Master's report.

During a period of forty-five years, from January 20, 1867, down to May 2, 1911, repeated efforts were made by Virginia to induce West Virginia to enter upon a settlement, all of which were without avail.

Six conspicuous efforts on the part of Virginia to bring about a settlement may be more particularly referred to.

These six efforts were as follows:

Governor F. H. Pierpont, of Virginia, sent a communication to Governor Arthur I. Boreman, of West Virginia, dated January 20, 1867, together with a joint resolution adopted by the General Assembly of Virginia on February 28, 1866, in reference to the reunion of the States of Virginia and West Virginia and the adjustment of the public debt, and appointing Mr. A. H. H. Stewart, Mr. William Martin and Mr. John Janny as commissioners to proceed to the seat of government of West Virginia, and giving them authority to treat with the authorities of West Virginia on both subjects.

On February 28, 1867, the Legislature of West Virginia adopted a joint resolution declining to entertain any proposition looking to a reunion of the States, and refusing to treat with the Commissioners of Virginia upon the adjustment of the public debt of Virginia until the suit of Virginia against West Virginia to recover jurisdiction over the counties of Berkeley and Jefferson had been finally disposed of (W. Va. Comp., Vol. I, pp. 444-445).

Governor Gilbert C. Walker, of Virginia, sent another communication to Governor William E. Stephenson, of West Virginia, in February, 1870, endeavoring to adjust the Virginia public debt with the State of West Virginia, and about the same time Messrs. William J. Robertson, W. T. Sutherlin, and P. H. Aylett, commissioners, appointed on the part of Virginia, also sent a communication to Governor Stephenson. The first communication was transmitted by Governor Stephenson to the West Virginia Legislature on February 24, 1870, and the second communication was so transmitted on February 28, 1870.

It appears from the joint resolution adopted by the Legislature of West Virginia after the receipt of Governor Stephenson's communication that the Virginia commissioners were then present in the city of Wheeling for the purpose of adjusting the public debt. The West Virginia Legislature appointed a committee to confer with the Virginia commissioners and report to the legislature, but as far as the journals of the House and Senate of West Virginia of the session of 1870 show no report was made by this committee (W. Va. Comp., Vol. I, pp. 446-447).

The defendant's answer states that afterwards, on March 3, 1870, the Governor of West Virginia was authorized by the legislature to appoint three resident citizens of the State to treat with the authorities of Virginia upon the subject of the proper adjustment of public debt of that State, but as there was an omission to make an appropriation to pay the expenses of West Virginia's commissioners, and the resolution authorizing their appointment was passed on the last day of the session of the legislature, the Governor of West Virginia stated in his message of 1871, that no appointment had been made owing to the lack of funds to pay the expenses of such commission (Original Record, pp. 151, 152).

On February 17, 1871, Governor Walker, of Virginia, sent another written communication to Governor Stephenson of West Virginia offering to adjust West Virginia's proportion of the public debt of Virginia by arbitration in accordance with a joint resolution of the General Assembly of Virginia approved on February 11, 1871 (W. Va. Comp., Vol. I, pp. 449-451), but West Virginia declined this offer (W. Va. Comp., pp. 452-454).

In February, 1895, Governor O'Farrell of Virginia, communicated to Governor McKorkle of West Virginia, a copy of the resolution adopted by Virginia

March 6, 1894, appointing commissioners for the purpose of negotiating with West Virginia for the payment of the proportion of the Virginia public debt to be borne by West Virginia, but no response was ever made by West Virginia, although her legisslature declined to negotiate with Virginia (W. Va. Comp., pp. 76 and 494).

On February 1, 1905, Mr. Randolph Harrison on behalf of the Virginia Debt Commission, addressed the joint committees on finance of the West Virginia Legislature in relation to West Virginia's contributive share of the debt of Virginia (W. Va. Comp., pp. 68-82), and as West Virginia was still unwilling to treat with Virginia this suit was begun. The last attempt of Virginia to treat with West Virginia is set forth in the motion papers on the motion of October 9, 1911, herein to proceed with the determination of the suit.

The only effort made by West Virginia at any time to settle this debt was made through a committee consisting of Messrs. John J. Jackson, J. M. Bennett, and A. W. Campbell, appointed by Governor J. J. Jacob, of West Virginia, under resolutions adopted by the West Virginia Legislature on February 15 and February 24, 1871. These gentlemen sent a letter to Governor Walker of Virginia notifying him of their appointment and inquiring what channel of communication with Virginia was open to them. Governor Walker replied that the joint resolution of Virginia providing for arbitration had superceded the joint resolution of February 18, 1870, authorizing the Governor to appoint commissioners, and for that reason that he could not appoint commissioners to confer with West Virginia.

He said that the tender of arbitration had not been withdrawn and was still open (W. Va. Comp., pp. 457-459). These commissioners of West Virginia then proceeded to determine for themselves the bal-

ance due Virginia from West Virginia, and found the amount to be 953,360.23 (W. Va. Comp., p. 472): but this determination was not satisfactory to the State of West Virginia, and the Senate Finance Committee of the West Virginia Legislature, on December 22, 1873, made a report to the effect that the State of West Virginia was not liable for any part of the debt of the undivided Commonwealth of Virginia, but that the State of Virginia was indebted to the State of West Virginia in the sum of $525,000.00 (W. Va. Comp., pp. 490-493). Ever since that time, with the exception of the proceedings resulting in the filing of the supplemental answer, West Virginia has taken the position that she does not owe any portion of the debt of the undivided Commonwealth of Virginia and that she would not enter into any negotiations looking to the settlement of the Virginia debt question. West Virginia's Legislature has repeatedly adopted resolutions denying that West Virginia owed any part of the so-called Virginia debt, and that her legislature was opposed to any negotiation whatsoever on that subject (W. Va. Comp., pp. 494-496).

The last visit of the representatives of Virginia to West Virginia with reference to the settlement of the debt took place on May 2, 1911, and subsequent to the time of the filing of the defendant's answer, but the previous efforts of Virginia to settle this debt and the refusals of West Virginia to do anything with reference to a settlement, are virtually admitted in the defendant's original answer in paragraph XI thereof.

It appears from the foregoing that Virginia on five separate occasions, in the years 1867, 1870, 1871, 1895 and 1905, tried to amicably settle this controversy, and, these repeated efforts having failed, that Virginia brought this suit in February, 1906, and in accordance with the decision herein, dated March 6,

1911, that she again endeavor to meet West Virginia, and it also appears that the only time West Virginia was willing in any way to discuss with Virginia the settlement of the debt, with the exception of the proceedings at Washington in 1913, was in 1871, when West Virginia appointed commissioners to treat directly with Virginia at a time when the General Assembly of Virginia had adopted a resolution providing for the settlement of the controversy by arbitration. It also appears that the findings of this committee fixing West Virginia's share in even the small sum of about $1,000,000 were repudiated by the West Virginia Legislature of 1873, and that from that time down to the present West Virginia has continually refused to treat with Virginia in any way for the settlement of this controversy.

West Virginia's excuse for failure to meet Virginia in 1867 was the pendency of the suit in this court in regard to the counties of Berkeley and Jefferson. The Governor of West Virginia was authorized to appoint commissioners to meet Virginia's commissioners in 1870, but he made no appointment because the legislature had failed to appropriate money to pay the expenses of such commission. Virginia's tender of arbitration in 1871 was declined, so West Virginia said, because West Virginia soon afterward appointed commissioners to treat with Virginia directly. West Virginia made no response to Virginia's offer in 1895, but her legislature declined to negotiate with Virginia and passed the following resolution:

> "House Joint Resolution No. 10, Concerning the Virginia Debt.
>
> "(Adopted February 7th, 1895.)
>
> *"Resolved by the Legislature of West Virginia,* That this legislature hereby declines to enter into any negotiations with the debt com-

missioners, or commission appointed under a joint resolution, adopted by the General Assembly of Virginia, in the month of March, 1894, looking to the settlement of the Virginia debt question, on the basis set forth in said joint resolution."

West Virginia's answer to Virginia's offer in 1905 was the following resolution:

"(H. J. R. No. 7.)

"Joint Resolution No. 3.

"(Adopted January 20, 1905.)

"Relating to the Virginia Debt.

"*Resolved by the Legislature of West Virginia,* That it is the sense of this legislature that the State of West Virginia does not owe any part of the so-called Virginia debt, and that this legislature is opposed to any negotiations whatsoever on that subject."

Counsel for West Virginia have attempted to justify West Virginia's refusal to meet Virginia in 1895 and again in 1905 because the resolution of the Virginia Legislature creating the Virginia Commission provided that the commission should not enter into any negotiations thereunder except upon the basis that Virginia is bound only for two-thirds of the debt of the original State, which she has already provided for as her equitable proportion thereof. An argument was based upon this provision that any negotiations conducted by the Virginia Commission must necessarily assume West Virginia's proportion to be one-third and that of course she was unwilling to negotiate on this basis.

The provision in the act referred to above was an arrangement between Virginia and her creditors. In 1871 Virginia assumed two-thirds of the debt and at once compounded and capitalized all the past-due in-

terest on this portion. The load was more than she could bear and finally, in 1892, she made a final and satisfactory settlement with her creditors. Of course Virginia did not propose to reopen this question. She had, up to 1906, paid out various sums amounting to upwards of $70,000,000 in payment of her proportion of the debt. It was perfectly right that she should stipulate with her creditors that the amount of her liability was already fixed and determined, as in fact it was. There is no excuse for assuming that the act of 1894, creating the Virginia Commission, or the act of 1900, authorizing this suit, in the slightest degree attempted to fix West Virginia's liability in advance as one-third or to predetermine it to any extent. West Virginia's amount was left open to be determined by negotiation between the parties. This is especially true when read in the light of the resolution of West Virginia's Legislature of 1895 and of 1905.

Conclusion.

This bill was filed February, 1906.

The decision overruling the demurrer (220 U. S., 290) was delivered March, 1907.

The decree referring the cause to a Master (209 U. S., 514) was entered March 4, 1908.

Hon. Charles E. Littlefield was appointed Master June 1, 1908.

Testimony was taken at Richmond between November 16, 1908 and July 2, 1909.

The case was argued before the Master in New York November and December, 1909.

The Master's report was filed March 17, 1910.

The decision of the Court fixing West Virginia's share of the principal (220 U. S., 1) was delivered March 6, 1911.

Virginia moved to proceed with the cause October 9, 1911.

The Court denied the application (220 U. S., 17).

Virginia again moved to proceed with the cause October 13, 1913.

The motion was again denied (231 U. S., 89).

After argument the Court granted leave to West Virginia to file her supplemental answer June 8, 1914.

West Virginia comprises 37.37 per cent of the land area and 36.18 per cent of the total area of the undivided State and on June 20, 1863, had 33.52 per cent of the population without slaves of the undivided State. The wealth of West Virginia has increased so rapidly that the assessed value in 1908 of West Virginia amounted to over $937,000,000 while that of Virginia was under $662,000.00. West Virginia in 1908 had 58.62 per cent of the combined assessed wealth of the two States (Original Record, p. 651). Virginia has paid over $77,000,000 on account of her share of this debt (Exhibits, p. 393). These payments have been made continuously and many of them during periods of great financial depression in Virginia. West Virginia's assessed wealth now exceeds one billion dollars. The case is over nine years old. The time has come when West Virginia should settle her liability to the creditors.

March 27, 1915.

HOLMES CONRAD,
SANFORD ROBINSON,
Counsel for the Bondholding Creditors

Schedule 1.

A statement showing all dividends, reduced to a gold basis, paid after January 1, 1861, upon the stock of all the banks, railroads and other companies, except the Richmond, Fredericksburg & Potomac Railroad Company, for which West Virginia makes a claim in this proceeding; taken from Defendant's Exhibit No. 12—1861 and 1863 (Exhibits, pp. 71-89; 227-240). In the case of the Richmond, Fredericksburg & Potomac Railroad Company, the dividends paid in and after 1882 are not shown.

Class B—*Richmond, Fredericksburg & Potomac R. R. Co.:—*

			Confed.		Net.
P. 2	1859	7% in Bonds } Paid in March			
	1860	7% " " } and July 1863	@ 7-2/5	=	9 100
	1861	3-1/2% not paid till 1873.....		=	3-1 2/1
	1862	5-1/2% No date, say Jan.....	@ 1-1/4	=	4[1]
	1863	8% May.....	@ 5-3/4	=	1[5]
		18-1/2% Dec.....	@19	=	97/100
P. 80	1864	13% Nov	@30-1/2	=	43/100
	1874	3-1/2% Feby.....		=	3-1 2/

Class C—*Orange & Alexandria R. R. Co.*

	1857				
	1858	Dividends were paid on Preferred Stock but the Rate is not given in the records of the case— See P. 14–15.			
	1859				
P. 227	1864	4% Sep.....	@25	=	16 100

Richmond & Danville R. R. Co.

P. 19	1859	4% (Paid in 1860).....			4[1]
P. 227	1863	6% Sep.....	@12-1/2	=	48/100
" "	1864	5% Mar.....	@23-3/4	=	21/100

Richmond & Petersburg.

P. 22	1857, 1858, 1859, 1860	Approx. 6%			6
P. 227	1861	0			
	1862	0			
	1863	6% July.....	@ 9	=	2 7/
	"	10% Nov.....	@16	=	625/1000
	1864	4% Jan.....	@20	=	1 5/
	"	10% Sep.....	@25	=	2 5/

Virginia Central R. R. Co.

P. 24	1859	Approx. 4%			4[1]
	1860	" 5%			5[1]
	1861	0%			
	1862	0%			
P. 22	1863	4% Nov.....	@16	=	1 4/
	1864	3% Sep.....	@25	=	12/100

Dividend bonds paid in 1863, taken up in Def. Class C (P. 26) covered dividends declared in 1851 and 1855,—as to $84,858.00

Balance we do not know when issued, but were settled after 1870 in State Bonds along with the $210,000, loan..... ..... 58,650.00

...s F—Virginia & Tennessee R. R. Co.

				Confed.	Net.
227	1864	6% Mar.	@ 23.75	= Approx.	1/4%
	"	6% Apr.....	@ 22.50	= "	1/4%

...rfolk & Petersburg R. R. Co.

227	1863	3% Sept.....	@ 12.50	= Approx.	1/4%
	1864	3% Mar.....	@ 23.75	= "	1/8%
	1865	6% Feb.....	@ 55.00	= "	1/9%

...s E—Farmer's Bank of Virginia.

48	1861	3-1/2% Jan.....	@ 1.00		3-1/2%
"	"	3-3/4% July...	@ 1.10		3-2/5%
"	1862	3-1/2% Jan	@ 1.25		2-4/5%
	1862	3% June.....	@ 1.50		2%
	1862	4% Dec	@ 3.00		1-1/3%
	1863	7-1/2% Dec	@ 19.00	Approx.	2/5%
"	1864	4% June.....	@ 18.00	"	1/5%
79	1864	8% Dec....	@ 41.50	"	1/5%

...k of Virginia.

50	1861	3-1/2% Jan.....	@ 1.00		3-1/2%
	"	3-1/2% July.....	@ 1.10	Approx.	3-1/5%
	1862	3-1/2% Jan.....	@ 1.25	"	3%
	1862	3% June.....	@ 1.50		2%
	1863	4% Jan.....	@ 3.00		1-1/3%
	1863	7-1/2% Dec	@ 19.00	Approx.	2/5%
	1864	4% June	@ 18.00	"	1/5%

...k of the Valley.

51	1861	3-1/2% Jan.....	@ 1.00		3-1/2%
	"	3-1/2% Sept.....	@ 1.10	Approx.	3-1/5%
	1862	3% Jan.....	@ 1.25		2-2/5%
	1863	4% Jan..... .	@ 3.00		1-1/3%
	1864	4% Mar....	@ 23.75		17/100%

...change Bank.

52	1861	3-1/2% Jan.....	@ 1.00		3-1/2%
	"	3-3/4% July	@ 1.10		3-2/5%
	1862	3-1/2% Jan.....	@ 1.25	Approx.	3%
	1862	3% Oct.....	@ 2.50		1-1/5%
	1863	4% Mar.....	@ 5.00		4/5%
	1864	8% Jan.....	@ 20.25		2/5%
80	1865	8% Jan.....	@ 52.50		3/200%

Schedule 2.

The following pages contain an examination and criticism of the cases cited in the briefs of West Virginia, presented to the master to sustain the contention that "par value" and "book value" are evidence of actual value.

These cases may be urged before this Court by West Virginia. They do not establish the principles contended for, but they do conclusively establish the direct opposite. They show that neither "par value" or "book value" are competent evidence to establish actual value.

The cases cited to show that the value of stock is presumptively its par value.

The principal case relied upon to establish this contention is *Appeal of Harris* (Pa.), 12 Atl., 743, discussed in the brief of Judge Holt and Attorney General Lilly.

Syllabus and quotations from the opinion stated in the brief are correctly given; but the essential part of this case is the modification of the decree printed at the bottom of the opinion substantially as follows:

Modification of Decree.

Feb. 6, 1888.

(In the original decree 215 shares at the par value of $100 had been given a value of $21,500. The modified decree recites this and then proceeds): "We do not think however, the appellants should be charged with it at its par value. * * * We have but little evidence of the value of this stock. * * * It was conceded by the appellants however that it was worth

$30 per share, and in the modification to the decree which is now made it is placed at that figure with the proper allowance for interest" (p. 753).

Upon reargument it appeared that there was but little evidence of the value of the stock; but the amount fixed in the original decree as $100 per share, was reduced to $30 per share; this value being conceded by the appellants. The par value was rejected and the only value charged against the appellants was the amount which they specifically conceded. The Court on reargument reversed its ruling and rejected the rule of law for which the case has since, in some other cases, been relied on, as an authority.

The other case cited by Judge Holt, Henry v. North American Ry. Const. Co. (58 Fed. Rep., 79), involves the question of value of bonds and not stock. An examination of the case discloses that the dictum was not involved in the decision. The Court below had ruled that in the absence of market value the face value of the bonds must be taken as the measure of value. It appeared that the defendant had offered other evidence as to value which was rejected. Without passing on the question of whether defendant's other evidence was competent the court reversed the judgment and ordered a new trial. If there is any presumption that face value equals real value of bonds this illustrates how easily the presumption is overcome.

The cases in Prof. Hogg's brief.

In no one of these cases was the par value of stock taken as fixing its actual value.

1. *Moffitt v. Hereford* (132 Mo., 513, 34 S. W., 252).

In this case the value was not found at part, but at $375. The stock had no market value. The corporate assets and the dividends earned were shown to

have varied but little for a number of years and on all the evidence in the case the value was fixed at the figure stated above.

2. *Bunkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.* (118 Mo., 461, 24 S. W., 129, 133).

The stock had no market value. The capacity of earning dividends had been nine per cent for ten years. The Court held that in the absence of market value, there were other methods of determining value. Dividends, the value of the assets, and the individual sales of the stock might be considered. As the capacity for dividends was shown to be large the admissions of the officers of the company that the stock was worth par was sufficient to contradict their evidence that the stock was only worth $60 or $70.

3. *Appeal of Harris* (Pa.) 12 Atl., 743.

This case has already been discussed.

4. *Alexander v. Relfe* (74 Mo., 495).

A receiver of a dissolved insolvent insurance company is suing for the withdrawal of corporate assets. The stock had been reduced from 9,763 shares to 9,000 shares and a draft for $900,000 previously paid for corporate assets was given in exchange for the 9,000 shares of stock surrendered. The Court held the transaction fraudulent in law and fixed the damages at the amount of the face of the draft. The case has no bearing upon the point.

5. *Mitcalfe's Case* (13 Ch. D. [Eng.], 169, 173).

A vendor of property to a company receiving full paid shares in payment of the property gave some of the shares allotted to him to a director. At the winding up of the company some of these shares remained with the director, some he had sold, and some he had given away. The director was held guilty of a misfeasance and compelled to pay in full the nominal

value of all the shares he received. This case also is without bearing on the point for which it is cited.

6. *Tevis v. Ryan* (Ariz.), 108 Pac., 465.

In this case there was evidence tending to show insolvency and the Court held that a method of determining the value of stock from the value of the assets and the liabilities of a corporation was correct.

7. *Walker v. Bement* (Ind. App.), 94 N. E., 339.

The question in this case was as to the sufficiency of the complaint upon a demurrer to the answer and the Court on the authority of *Appeal of Harris* and the Missouri cases above cited held that the complaint stated a cause of action.

No case is cited in either brief where the par value of stock is taken as fixing its actual value.

In *Beaty v. Johnson*, 66 Ark., 529, cited at page 41 of Judge Holt's brief the Court repudiated as unsound the rule that par value was *prima facie* evidence of actual value.

The cases relating to book value.

We have examined all of the cases cited upon this point in Prof. Hogg's brief except the case of

> *Proprietors of Long Wharf v. Palmer*, 37 Mo., 379.

We could not find this case in the place cited and think the reference was misprinted.

No one of these cases decides that the value of the stock of a corporation or the actual value of its assets can be determined from the corporate books.

1. *Hayden v. Williams* (96 Fed., 279, 282, 283; 37 C. C. A., 479).

The corporate books were used to show insolvency on the authority of *Hubbell v. Meigs* (discussed below).

2. *Brown v. Ellis* (103 Fed., 834).

Suit by a receiver to recover against an executrix for seventy-five per cent assessment on corporate shares.

3. *Trainor v. German-American Savings L. & B. Ass'n* (204 Ill., 616; 68 N. E., 650).

The opinion states that elections, and other corporate acts, and proceedings may be shown from the corporate records and minutes. The case holds that in the foreclosure of a loan against a member the corporate books when unverified by extrinsic proof cannot be used.

4. 9 *Am. & Eng. Enc. Law* (2nd Ed., 895) states the principles in regard to the use of corporate books and records as follows:

(a) As between members of the corporation, corporate books can be used to show the acts and transactions of the corporation.

(b) As between a member of the corporation and a stranger the corporate books and minutes can be used to show organization and corporate acts; but not to show the private business transactions of the corporation.

5. *Dolan v. Wilkerson* (57 Kan., 758; 48 Pac., 23).

The records and minutes of a corporation are not evidence in its favor against a stranger.

6. *Jefferson v. Stewart* (4 Har. [Del.], 83).

Suit by a corporation against a member for marsh taxes.

7. *Merchants' Bank v. Rowls* (21 Ga., 334).

As between a corporation and a shareholder the corporate books are evidence of the accounts between them.

8. *Macon & A. R. Co. v. Vason* (57 Ga., 314).
The stock ledger was admitted in a suit for an unpaid stock subscription.

9. *Protection Life Ins. Co. v. Dill* (91 Ill., 174).
On proof of loss of an insurance policy it was error to exclude the "policy register" of the insurance company which contained substantially the complete copy of the lost policy.

10. *Proprietors of Long Wharf v. Palmer* (37 Mo., 379).
(Not found.)

11. *Redding v. Goodwin* (44 Minn., 355, 46 N. W., 563).
The records of a corporation held not to be evidence against the defendants not members to show the company's property had been attached and that insolvency proceedings were necessary.

12. *Alemethy v. Society of the Church of the Puritans* (3 Daly [N. Y.], 1).
Books and minutes of a religious corporation were admitted to show the acts and proceedings of the church in an action to restrain the selling of a pew.

13. *Hubbell v. Meigs* (50 N. Y., 480).
The question was whether the *defendant knew* that the stock was worthless and the company bankrupt. The company's books were held to be evidence between the stockholders to show the company's acts. The books were not used to show the value of the assets.

14. *First Nat. Bank v. Tisdale*, 84 N. Y., 655).
The defendant, a stockholder, director and vice-president of a transportation company, sued upon a note given to the bank, defended on the ground that the note was given without consideration. The plain-

tiff claimed the note was connected with a loan of the transportation company and the entries in the books of the transportation company were admitted as evidence against the defendant to show this relation.

15. *Commonwealth v. Woelfer* (3 Serg. & R. [Pa.] 29, 8 Am. Dec., 628 and note 640).

Action in the nature of a *quo warranto* for usurping the offices in a church. The minutes were introduced to show the acts of the company.

16. *Diehl v. Adams County Mut. Ins. Co.* (58 Pa. St., 443).

This was a suit on an insurance policy and involves no question as to the value of the company's assets.

17. *Ledeier v. Morrow* (132 Mo. App., 438, III S. W., 902).

In a suit against the officers of the company for fraud and misrepresentation as to the value of the company's stock, the books of the company kept by proper agents of the company were admitted because the agents of the corporation were held to be the agents of the officers.

18. *Giboa v. Kimball* (R. I., 69 Atl., 765).

In a suit to recover the value of shares of stock it was held proper to prove the fact that the books of the corporation showed a surplus at or near the time of the transaction under consideration when this corroborated the testimony of the plaintiff and was in accord with the probabilities.

19. *Wesp v. Muckle* (120 N. Y. S., 976, 136 App. Div., N. Y. 241).

In an action against a director for the recovery of dividends paid out of capital the ledger of the company was used to show the fact that the capital was impaired.

20. *Sawyer v. Manchester, etc. R. R. Co.* (13 Am. State Rep. note at p. 551).

The note lays down the following principles. (a) The records and minutes of the corporation if properly kept are evidence of the acts of the corporation. (b) The books are not competent evidence of the private business transactions of the corporation except perhaps as between the members of the corporation. They are not admissible in evidence as to the private business transactions of the corporation as between a member and a stranger.

21 *Carey v. Williams* (79 Fed., 909).

This case is a direct authority against the principle contended for by the defendant. It holds that entries on the books of a corporation showing the purchase of stock by a person and payments made by him thereon are not *prima facie* evidence that he is a stockholder in a suit to charge him as such. The Court says at page 909, corporations are not exempt from the ordinary rules of evidence and that there is no stronger presumption of honesty, regularity or accuracy as to their records than in the case of actual persons; at page 911, the corporate books are evidence of the acts and proceedings of the corporate body; at page 912, that the business entries in the books of a corporation are no more evidence against its members than they are against strangers, citing *Rudd v. Robinson*, 216 N. Y., 113.

The opinion in *Rudd v. Robinson* is a very thorough examination of the subject. The Court states that after a careful consideration of the cases it can find no principle upon which the account books of a corporation are evidence against a member of the corporation as to the accounts and entries therein. The officers and bookkeepers of the corporation are not the agents of the members.

The other case cited in Prof. Hogg's brief on this point is *Curme, D. & Co. v. Rouh,* 100 Ind., 247.

This is a suit in replevin by the seller against a mortgagee of the buyer based on the contention that the buyer did not intend to pay. The balance sheet and tax list return of the buyer were held to be admissible as his admissions of his insolvency.

An examination of all these cases discloses that in no one of them was the value of the stock of the corporation or the actual value of the corporate assets determined from the entries in the books. There is not a suggestion in the language of any of them that the value of corporate stock or of corporate assets can be so determined.

The cases hold:

1. That the formal corporate acts of the corporate body can be shown from its minutes and records.

2. As between the members of a corporation some cases hold that the corporate books and records are evidence of the private transactions of the corporation.

This line of cases starting with *Hayden v. Williams, supra,* where the books of the corporation were used to show insolvency of the corporation rely upon *Hubbell v. Meigs, supra.* As stated above this was an action for deceit, and the material question was as to defendant's knowledge of the condition of the company and value of its stock. One of the defendants was held to know that the stock was worthless and the company bankrupt. As to him a reversal was ordered. As clearly appears from the syllabus of the case the company's books were used as evidence of the company's acts and not as evidence of the value of the company's assets. The authority on this point is not all one way. A later New York case, *Rudd v. Robinson,* 126 N. Y., 113, *supra,* after a very careful con-

sideration of all the cases holds that there is no principle on which the account books of a corporation can be used as evidence of the accounts and entries therein even against a member. This case is cited with approval and followed in *Carey v. Williams, supra,* relied on in Prof. Hogg's brief at page 57.

3. As between a member and a stranger the corporate books and records are not evidence of the private transactions of the corporation under any circumstances.

This is the purport of the cases cited in Prof. Hogg's brief and of the article 9 *Amer. & Eng. Enc. Law,* (2nd Ed.), 895, and the note to *Sawyer v. Manchester, supra.*

There is not a suggestion in any one of these cases that the books of the corporation are competent evidence either presumptive or conclusive of the actual value of the corporate assets or of the value of the corporation's stock even as between the members of a corporation.

The contrary is clearly established by the cases cited in the brief by Judge Holt and Attorney General Lilly. No one of them is authority for the proposition that the actual value of the stock can be established by considering "par value" or "book value." No case there cited holds that either "par value" or "book value" may be considered in determining actual value.

Cases cited in the brief by Judge Holt and Attorney General Lilly.

1. *Julia v. Critchfield* (147 Fed. Rep., 65).

The court said the real or intrinsic value of the stock if issued should be determined from the proved assets of the corporation.

2. *Nelson v. First Nat'l Bank* (69 Fed. Rep., 798). The court said the value of the stock could be determined from the testimony of competent witnesses as to the amount and value of the assets of the corporation.

3. *Henry v. North Am., etc., Co.* (158 Fed. Rep., 79).

This case involved bonds, not stock, and has already been discussed above.

4. *Butler v. Wright* (103 N. Y. App. Div., 463). The value of the stock was shown from the contracts the company had made, the nature of its business, the amount of dividends and other facts relating to the value of its property and income.

5. *Cabbel v. Cabbel* (111 N. Y. App. Div., 426-33). The value of the stock was proved by testimony of a person connected with and having personal knowledge of the affairs of the corporation. The court rejected an inventory of the corporate assets prepared by the corporation and citing.

People ex rel. Ins, Co. v. Coleman, 107 N. Y., 541. laid down the rule that the value of shares of stock should be determined by considering the business, property, value of the actual assets, amount and nature of liabilities, dividends, market value or any or all of these. In this case the Court also said that to get the book value of the corporate assets the value of the assets would have to be estimated instead of taken at what they were carried on the books.

6. *Vonau v. Magenheimer* (126 N. Y. App. Div., 257; 196 N. Y., 510).

The plaintiff represented stockholder suing the officers for fraud and deceit for depressing the value of the stock so that they might buy it up. Defend-

ants reduced the dividends from 14% to 3%; raised their own salaries from $2,500 to $7,500; and immediately after purchase declared a special dividend of 10% to meet the purchase price and reduced salaries to $4,000. The jury found the value of the stock at $171. The book value was $109. Other subsequent balance sheets of the corporation were introduced for the purposes of comparison with the balance sheet showing this book value of $109. The Court held that on all the evidence the stock was worth the full amount of $171, found by the jury.

7. *Leurey v. Bank of Baton Rouge* (58 So. Rep., 1022 [La.]).

The value of the stock may be determined from the net value of the corporate assets and its good will or earning capacity.

8. *Beaty v. Johnson* (66 Ark., 529).

The value of the stock may be determined from the value of the property and business of the corporation compared with the liabilities. The par value of stock is not *prima facie* evidence of actual value. *Appeal of Harris* was cited for this last proposition. The Court criticises the case and repudiates the rule.

9. *McDonald v. Danahy* (196 Ill., 133).

Makes no mention of book value.

10. *Greer v. Lafayette County Bank* (128 Mo., 559).

Considers dividend earning capacity.

11. *State v. Carpenter* (51 Ohio State, 83).

Decides that mandamus is not a proper remedy to secure the issuance of stock certificates from a corporation. The opinion states that the value of the stock may be determined from the value of the business, good will, and dividend earning capacity.

12. *White v. Jouett* (147 Ky., 197).

The value of the stock may be determined from the value of the property and business.

The foregoing cases seem to establish the rule that in the absence of market value the actual or intrinsic value of the stock of the corporation may be determined from the value of the property and assets owned by the corporation, the dividends paid, character and permanency of its business, control of the stock, management of the corporation, its markets, all other facts—over a broad range—any fact calculated to effect value.

No one of these cases cited on page 41 holds that either "par value" or "book value" can be considered in determining actual value of the stock of the corporation. One of the cases specifically repudiates par value as *prima facie* evidence of value and another rejects a corporation's inventory of its assets as evidence of the value of the assets. In only one case were the balance sheets of a corporation considered and in that case the balance sheets were only used for the purposes of comparison in an action for deceit against the officers of a corporation to discredit an earlier balance sheet showing a value of $109. The stock was held to be worth $171.

The Rule of Law Established by the Cases.

The purport of all the cases cited in both briefs is that neither "par value" or "book value" is competent evidence of the actual value of the stock. This must be determined from the market value. If there is no market value the actual value must be determined from a comparison of the actual value of the corporate assets and liabilities; from the corporate dividends; earning capacity and good will; from the nature and the permanency of the corporation's business; the management and all other facts calculated to effect value.

FILE COPY

IN THE

Supreme Court of the United States

IN EQUITY, No. 2, ORIGINAL.

OCTOBER TERM, 1914.

COMMONWEALTH OF VIRGINIA, Complainant,

v.

STATE OF WEST VIRGINIA, Defendant.

BRIEF OF COUNSEL FOR VIRGINIA UPON THE HEARING APRIL, 1915.

JNO. GARLAND POLLARD,
Attorney General of Virginia.

RANDOLPH HARRISON,
WM. A. ANDERSON,
Of Counsel for Virginia.

April 15, 1915.

RICHMOND PRESS, INC., PRINTERS

FOREWORD.

Appreciating, as we do, the thorough and patient consideration which the master had given to the case, the difficult character of the questions upon which he has had to pass, and the earnest desire and purpose which he has continually manifested to do equal and exact justice between the parties, and realizing the complex character of the litigation, the necessarily unsatisfactory character of some of the evidence and the importance of bringing this suit to an end as soon as a just result can be reached, we are convinced that the Complainant would be justified in assenting to liberal concessions in order to terminate this costly and vexatious litigation.

It may be pertinent in this connection to call attention to the following important considerations:

1. That, upon the main issues now presented, the burden of proof is upon the Defendant, and this requires her to make out her case upon every material point, by competent and convincing proofs, and if, upon any point, the evidence in support of any of her claims or contentions, is unsatisfactory, West Virginia must be held to have failed in maintaining her case in those particulars.

2. That, not only is this general rule of practice in the due administration of justice, applicable to this case, but, as was expressly and justly decided by this Court in its decree of March 6, 1911, adjudicating the main principles of the case; *"It is enough to refer to the circumstances in which the separation took place to show that Virginia is entitled to the benefit of any doubt so far as the construction of the contract is concerned."*

Notwithstanding these considerations the Master, as appears to us, has resolved every reasonable doubt upon every important question in favor of the defendant, and has, in our opinion, erred in some of his findings in particulars which involve large sums to Virginia and her bondholders, who have confided their interests to her keeping, nevertheless, in order to secure a final settlement without further delay or litigation, we would be strongly disposed to accept, as a finality, the result of the Master's report and findings, just as they have been made by him, including, of course, the allowance of interest from January 1st, 1861, the Court to give due effect to those findings by an appropriate decree, or decrees.

We venture to make this suggestion in a spirit of conciliation and compromise, in the belief that it would be better for all parties concerned that such an adjustment should be decreed by this Court, although it would involve large concessions by Virginia.

Such an adjustment would mean a decree against West Virginia for the amount ascertained by the decision of March 6th, 1911, to be due, namely, $7,182,507.46. less the sum of $2,868,839.49, the aggregate of the credits allowed by the Master (see page 116 of his Report) which leaves as the balance due by, and to be decreed against West Virginia as of January 1st, 1861, the principal sum of $4,313,667.97, with interest thereon from that date until the same shall be paid.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 2, ORIGINAL.

COMMONWEALTH OF VIRGINIA, Complainant,

v.

STATE OF WEST VIRGINIA, Defendant.

BRIEF FOR VIRGINIA UPON THE HEARING APRIL, 1915.

This cause is now submitted for final adjudication upon the Report of the Special Master Filed January 22, 1915, the Exceptions taken thereto by the parties respectively, and the testimony in the cause *relative to the issues* thus presented.

I.

WEST VIRGINIA'S EXCEPTIONS TO THE REPORT.

We will consider first West Virginia's exceptions to the Report.

(1) West Virginia's first exception is to the finding of the Master that "West Virginia's liability for interest begins on that date" (January 1, 1861), "by virtue of the contract between her and Virginia, and runs at the rate provided for in the bonds that evidence the debt, and make the interest an inseparable part thereof".

This conclusion of the Master is stated at the foot of page 10 and top of page 11 of his report.

The grounds upon which that conclusion is based are stated on pages 2 to 10 thereof.

We cannot hope to add anything to the force of his reasoning in favor of this finding, for it is a demonstration.

Without elaborating the arguments which have heretofore been repeatedly presented to the Court in its support, we would emphasize the basic proposition, that, when West Virginia, by her compact with Virginia, expressed in Section 8 of Article VIII. of her first Constitution, as one of the fundamental conditions, and an essential consideration for the consent of Virginia, and of the National Congress, to her existence as a State, covenanted that:—

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first of January, in the year eighteen hundred and sixty-one, shall be assumed by this state."

She assumed an equitable proportion, as well of the interest, as of the principal of that debt; for, as was well known to, and in the full contemplation of, both contracting states, that debt was an interest bearing debt represented by interest bearing obligations, so that the interest was an integral and inseparable part of the debt assumed, inevitably as much a part of it as was the principal.

If there could be any possible question as to the necessary and logical correctness of this conclusion, any such question would be negatived by these farther provisions of that Section of West Virginia's initial Constitution:—

> "And the Legislature" (of West Virginia) "shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

By this significant and explicit language of her proposal to Virginia, afterwards accepted by that State, the new State not only recognized her obligation to pay all of the accruing interest upon her share of the State debt, but provided for the payment of both the interest and the principal thereof in the same manner in which under the Constitution and laws of Virginia the old State had, since its Constitution of 1851 and the Statute passed in pursuance thereof, been making provision for the liquidation of the public debt of the Commonwealth.

Such was the proposal submitted by the new state to the parent state, and to the National Congress and such the natural and reasonable sense in which that proposal must have been accepted by the high contracting parties.

The provision for the payment of the interest and principal of West Virginia's share of the debt thus embodied in her compact with Virginia, was, as the Master points out, precisely in accordance with the plan which had long theretofore been adopted by the Commonwealth for the payment of this debt.

This plan was embodied not only in the Statutes but in the Constitution of Virginia in force when West Virginia became a State.

It was expressed in that Constitution in the following terms:

> "29. There shall be set apart annually, from the accruing revenues, a sum equal to seven per cent. of the State debt existing on the first day of January in the year one thousand, eight hundred and fifty-two. The fund thus set apart shall be called the sinking fund, and shall be applied to the payment of the interest of the State debt, and the principal of such part as may be redeemable. If no part be redeemable, then the residue of the sinking fund, after the payment of such interest, shall be invested in the bonds or certificates of debt of this Commonwealth, or of the United States, or of some of the States of this Union, and applied to the payment of the State debt as it shall become redeemable. Whenever, after the first day of January, a debt shall be contracted by the Commonwealth, there shall be set apart in like manner, annually, for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction; which sum shall be part of the sinking fund, and shall be applied in the manner before directed. The General Assembly shall not otherwise appropriate any part of the sinking fund or its accruing interest, except in time of war, insurrection, or invasion."

Section 29 of the Constitution of Virginia, in force from January 1, 1852, Code of Virginia for 1860, p. 47; Appendix to the Record, p. 200.

It was expressed and given further effect by the second section of the following Act passed by the General Assembly of Virginia:

> "Chap. 17. An act establishing a sinking fund and providing for the payment of the semi-annual interest on and redemption of the Public debt.
>
> Passed March 26, 1853.
>
> "2. Whenever after the said first day of January, eighteen hundred and fifty-two, a debt shall be contracted by the Commonwealth, there shall be set apart, in like manner, annually for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction, which sum shall be part of the sinking fund, and shall be applied in the manner heretofore directed."

Acts of General Assembly of Virginia, session of 1852-3, p. 29; Appendix to the Record, pp. 200-201.

Its effect was, therefore, well understood to be to conform the undertaking of West Virginia in regard to the time and manner of the payment of her share of the debt to the plan and scheme of payment which had been adopted by the Commonwealth, and which experience had approved.

That scheme was, the creation from the annual revenues of the State, of a fund equivalent to seven per centum of the principal of the debt. Of this, six per centum went to pay the annually accruing interest, and one per centum was invested and set apart to retire the

principal sum due, within thirty-four years, and this arrangement was defined as a sinking fund.

It was found, and, if the calculation is made it will be shown to be true, that one per centum of any sum invested and compounded at six per centum interest per annum, will in thirty-four years produce an amount equal to such sum.

This was the theory and the plan which Virginia had adopted for the liquidation of her debt.

It was a plan with which Messrs. Willey, Van Winkle, Brown, Haymond, and other members of the first West Virginia Convention, who had been previously members and some of them able members of the General Assembly of Virginia, were doubtless entirely familiar; And it is the same plan which we find incorporated in the scheme of settlement which constitutes a part of the foundation upon which West Virginia's existence as a State rests.

By this clause of West Virginia's Constitution, therefore, it was required, not that the new State should pay a lump sum in cash, to be ascertained in the manner prescribed, but that she should *"assume"* an equitable proportion of the public debt of the Commonwealth existing on the 31st of December, 1860, and should "provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

The framers of the West Virginia Constitution thus manifestly adopted, and engrafted upon that instrument the plan which for nine years or more had been a part of the organic and statutory law of Virginia for the extinguishment of her public debt, and the Legislature of Virginia accepted and approved that plan.

That plan included, (as the West Virginia Constitution also expressly included), an undertaking on the

part of the State to pay the accruing interest, and to liquidate or redeem the principal of each bond representing the debt, within thirty-four years.

The language in which this compact between the two States is expressed in the Constitution of the new State is significant in another important particular. It not only is a stipulation for the payment of interest by West Virginia but it clearly indicates the *rate* of that interest.

The scheme of the sinking fund thus taken from the legislation and practice of the old and incorporated in the fundamental law of the new State, included, and indeed was based upon, six per centum to be annually applied to the accruing interest, and in addition thereto one per centum of the principal of the debt to be provided, set apart, and invested at six per centum per annum, as a fund for the ultimate extinguishment of the principal of the debt in thirty-four years.

An annual appropriation of seven per centum of the principal sum of a debt, of which six per centum was to be applied to current accruing interest and one per centum to be invested and compounded at six per centum, and these dispositions only, will take care of the interest and effect the extinguishment of the principal of such a debt in thirty-four years, the precise period specified in the West Virginia Constitution; and such provision only will satisfy the requirements of that Constitution.

So it is manifest that these North Western Virginians who thus engrafted the principles and the practice of the Old Virginia Sinking Fund upon the financial Article of the Constitution of the new State, contemplated and plainly intended that, six per centum per annum, the rate of interest upon which the sinking fund they prescribed was predicated, the prevailing rate of interest

stipulated in the obligations of the Commonwealth, and then and long before that time the contract rate under the laws of Virginia, should be the rate of the accruing interest which West Virginia agreed to pay.

In simple language, the stipulation of West Virginia expressed in her Constitution, and accepted and acted upon by Virginia, was, that West Virginia would pay the accruing interest on her share of the debt, as it should accrue, and the principal thereof within thirty-four years.

That such was her express undertaking, appears from the language of her first Constitution, interpreted according to the reasonable and natural meaning of that language.

That such was the purpose, meaning, and effect of that language, is conclusively shown when we read it in the light of the plan established by the Constitution and statute of Virginia, then in force, for the establishment of a sinking fund for the liquidation of her public debt which plan was adopted by the new State as to its share of that debt.

The terms of the compact upon which Virginia consented to the division of her territory, afford unanswerable grounds for the Master's finding that the new State is bound to pay interest. The Equity of this conclusion, though it needs no such reinforcement, is confirmed by the following facts and considerations:

The holders of the old Virginia bonds, the creditors of the undivided State, all of whom, by plenary and exclusive authority from them, Virginia, and Virginia alone, represents in this suit, are entitled, by the terms of the bonds they hold, to be paid interest.

Virginia, as the record shows, has at the cost of a great effort, and great sacrifices, endeavored to meet

her obligation as to the two-thirds of the common debt including two-thirds of the then accrued and unpaid, *and two-thirds of the capitalized, interest,* upon the whole debt, which she assumed by the Act of March 30, 1871.

Since that act became operative, that is since December 31, 1871, and down to September 30, 1913, she has paid on account of interest alone $33,977,115.41.

Besides the interest paid by Virginia since December 31, 1871, she paid before that date, on account of interest, $7,094,103.61,—the significance of which item will be presently noted,—making her total payments on account of interest to September 30, 1913, the latest date to which we have the figures, $41,071,219.02.

In addition to these payments on account of interest, she has actually paid off and retired down to September 30, 1913, $12,141,490 of the principal of the debt; and in addition to this she has assumed, issued her obligations for, novated and is and has been for years regularly and promptly paying the interest upon $24,645,075.23 of the debt.

This sum added to the sums she has paid off gives $77,857,885.74 as the aggregate sum, either actually paid off by Virginia in cash, or assumed by her since January 1, 1861, out of, and on account of the debt of the undivided State.

See for the above figures, Plaintiff's Exhibit No. 22, p. 429 E.

Such were the contributions, to September 30, 1913, made by Virginia towards the payment of this common debt, the larger part of them having been made more than a quarter of a century ago out of the scant means of an impoverished people.

In this connection we deem it due to truth and justice to mention a fact which we recall in no spirit of acrimony, namely, that during all this period of more than half a century West Virginia has not paid, or offered to pay, one dollar towards the discharge of this large common indebtedness.

But, more distinctly, upon this question of West Virginia's liability for interest, we invite attention to the fact shown by the above cited authentic exhibit printed at 429 E., that, besides assuming and providing for two-thirds of the whole aggregate debt, including accumulated and capitalized interest to July 1, 1871, and actually paying the sums which she has paid, and adjusted on account thereof since that date, sums which, having reference to her then impoverished condition, were simply enormous, Virginia, on and after January 1, 1861, and *prior to December* 31, 1871, actually paid the sum of $7,094,102.61 on account of interest on that common debt.

That is to say, besides assuming two-thirds of the interest and principal of the whole debt accumulated to July 1, 1871, Virginia paid off, in addition thereto, $7,094,103.61 on account of the interest accrued before that date, on the undivided debt including West Virginia's share thereof as well as her own; and did not bring this large item into the account in the settlement which she made with the common creditors under her funding Act of March 30, 1871.

Besides this large contribution by Virginia in excess of the two-thirds or more, assumed under her funding acts, it must be in justice to her noticed that among the large payments made by Virginia on account of the principal and interest of the Old Virginia debt, the present State of Virginia has, since December 31, 1871, paid

off, settled, and discharged, so far as West Virginia is concerned, $864,842.03 of principal, and $1,453,577.78 of interest as of October 1, 1914, making in all $2,218,319.81 due upon obligations of the Commonwealth, constituting a part of the recognized debt ascertained in this cause to be due by her on the 1st of January, 1861, *not embraced in any settlement made under any of the Virginia Funding Acts and never before brought into the account between the two states.*

See Plaintiff's Exhibit No. 16, pp. 418 and 419 E.

The obligations of the undivided state for the $7,094,103.61 of interest paid by this State prior to December 31, 1871, and for the $2,218,319.81 of principal and interest paid off by Virginia since December 31, 1871, as shown by her said Exhibit, No. 16, are, with other obligations paid off by her, held by Virginia in her own right, as claims against West Virginia for which she is entitled to contribution from that State to the extent of West Virginia's aliquot liability therefor, under the averments of the Bill and the proofs in the Cause.

But these items of the account, as well as the other large items of payment made by Virginia in discharge of the principal and interest of the common debt, are relied upon by her in support of the manifest equity of her claim that West Virginia, when she shall be required to pay "an equitable proportion" of the debt of the unsevered Commonwealth, must be required to pay 23½% of the accruing interest, upon that debt, so long as that interest shall accrue, that is until the principal of her share of the debt shall be paid,—as well as 23½% of the principal thereof.

It is a gratifying circumstance that by reason of West Virginia's enhancement in prosperity and wealth

during the time that this interest has been accumulating, the payment in full of the interest which she assumed and justly owes, will impose no serious burden upon her, and that it will be much easier for West Virginia to pay the 23½% of the Virginia debt, including full interest until the same shall be paid, now, than it would have been to have paid the principal, or one-half of the principal sum thereof thirty, forty, or forty-five years ago.

Defences relied on by West Virginia against her liability for interest.

Against her liability to pay interest, West Virginia's counsel have heretofore urged two grounds of defence, each exceedingly technical having regard to the facts of this case, and neither affording any justification for the immunity claimed.

(1) The first of these defences is that the Cause of Action of the Complainant here is for an unliquidated demand, and that interest is not recoverable upon such a demand.

(a) If it were true, which we deny, that the Cause of Action, or claim asserted by Virginia here comes within the terms or the reasons of the doctrine asserted by the authorities heretofore relied upon by opposing counsel as holding that interest is not recoverable upon an unliquidated demand, a complete response to their contention is furnished by the circumstances that West Virginia has by her express contract agreed to pay interest upon that demand.

All that the authorities, heretofore cited by West

Virginia's counsel, hold is, that a contract to pay interest upon unliquidated demands of the character they consider will not be implied.

They have not held, and they would not have stultified themselves by holding, that a party who is competent to contract could not by express agreement bind himself to pay interest upon an unliquidated claim.

Here, as we have seen, and as the Master has found, West Virginia has expressly promised to pay the accruing interest upon her equitable share of the principal of the old Virginia debt.

(b) This renders unnecessary the consideration of the proposition contended for by adverse counsel, that Virginia's claim here is such an unliquidated demand, that interest will not be allowed upon it.

We will be content therefore briefly to refer to some of the principles of law which exclude such a claim as that of Virginia here from the general rule relied on by Defendant's counsel.

The claim of Virginia is a *pecuniary* claim, for money due upon an express contract, a contract not only for the payment of principal, but for the payment of interest upon that principal.

It is true that computation is necessary to ascertain the amount due, but it is equally true that by computation that amount can be determined.

This is no longer to be questioned, for this Court has, by its decree of March 6, 1911, determined the principal sum due, which amount, if West Virginia shall be allowed to set up off-sets against it, will be reduced by those off-sets. Still, the result is a matter of computation.

Most of the cases in the books in which interest has

been excluded, are cases of tort, or cases plainly sounding in damages.

This case is distinctly upon a specific pecuniary demand for the payment by the defendant of her equitable share of the principal and interest of a debt certain, which equitable share she has agreed to pay.

It is clearly a case in which an action of debt would lie, and one to which the principle of "*Id cerium est, quod* certum reddi protest" applies.

Even under the rule asserted for the defendant, interest would be payable upon a pecuniary liability like that of the defendant here.

But this is clearly not a case for the recovery of unliquidated damages which terms are defined as applying to, "cases of tort, as slander, assault and battery, etc., and to cases upon a *quontum meruit,* for goods sold delivered, or services rendered."

Cox v. *McLaughlin,* 76 Cal., 60, 18 Pac. 100, 104; 9 Am. St. Rep. 164, 169-172.

But this is not in any sense a case sounding in damages, but it is a suit to enforce a specific contract, and to ascertain by computation the amount which the defendant promised to pay thereunder.

(2) There was a belated attempt, which may be possibly renewed, to assert laches as a defence against the recovery of either principal or interest by Virginia.

Any such defence is absolutely without merit against this State.

It is based upon the singular assumption that Virginia is to blame, because she exhausted friendly negotiation before bringing her suit, and did not institute it

until after her repeated overtures to West Virginia for an amicable adjustment had all been successively rejected.

Like other defences, unless disclosed by the bill, the defence of "laches" must be asserted in the answer or other defensive pleading.

Here it has never been set up by the answer, or other pleading, and is negatived by the allegations of the bill. It will not be allowed to be set up by amendments of answer long after the filing of same; or after the reference to a Master and the filing of his report.

Dixon v. *Dixon,* 1 Md. Ch. 171;
Thornton v. *Hantze,* 91 Ill. 199;
Webb v. *Fuller,* 83 Me. 405, 22 Atl. 384;
See also 16 Cyc. 176 and 177 and citations.

We ask leave, however, to briefly consider this defence as heretofore presented for the Defendant, because of its relation to other equitable features of the cause.

The defence of "laches," in equity, is only permitted to defeat an acknowledged right on one or both of the following grounds:

(1) That it raises the presumption that the claim has been abandoned or satisfied.

(2) That the party pleading it has been seriously prejudiced by the culpable failure of the plaintiff to assert his claim.

Demuth v. *Old Town Bank,* 85 Md. 315, 37 Atl. 260, 268;
Coles v. *Ballard,* 78 Va. 139, 147;
Wisler v. *Craig's Adm'r,* 80 Va. 22, 30;

Cottrell v. *Watkins*, 89 Va. 101, 19 L. R. A. 754;
Johnson v. *Atlantic Gulf & West India Transit Co.*, 156 U. S. 618, 648;
Selbag v. *Abistal*, 4 Maule & S. 462;
Morse v. *Seibold*, 147 Ill. 318, 35 N. E. 369, 371;
Hall v. *Otterson*, 52 N. J. Equity 522.

Not one of the grounds upon which such a defence must rest as shown by the authorities exists here.

(a) Any presumption of satisfaction of her share of the debt by West Virginia or of abandonment of her claim is absolutely rebutted by the proof that the new State has never paid, and has failed and refused to pay, a dollar on account of the Virginia debt, and that Virginia has persistently urged a settlement.

(b) Nor is there any evidence in the case showing, or tending to show that West Virginia has suffered prejudice from Virginia's forbearance to sue.

No evidence helpful to her has been lost. *The substantial proofs of the debt and of West Virginia's liability for it, are all matters of irrefutable record*, all of which have been kept and preserved with wonderful accuracy and fidelity, so that the absolute verity of every item of the account and every entry upon those voluminous records, covering the transactions of forty years, has compelled the candid assent of the accountants and the counsel for West Virginia.

On the contrary, West Virginia has profited enormously by her long delay in making a settlement with Virginia.

While Virginia has been struggling to meet her just obligations on account of this common debt, and has paid

and assumed at least $78,000,000.00 as of the present year, most of her payments having been contributed many years ago, when her people were less able to pay one dollar than West Virginia is now to pay five, West Virginia, husbanding her resources, and compounding her wealth, has not paid one cent.

Instead of her position and ability to pay having been impaired by this long delayed settlement, for the postponement of which she is largely responsible, she has profited so greatly by it, that her taxable resources have increased from a total assessed valuation of $126,060,743.00 in 1867 to $937,232,718.54 in 1908, an enhancement of 643 per cent. See Plaintiff's Exhibit E-3, R. 651.

It appears from this same authentic exhibit that the taxable resources of Virginia increased during the same period from $354,848,482.69 to $661,796,631.00 or only about 84 per cent.

That comparative schedule of taxable resources, fairly interpreted, demonstrates another thing, namely, that instead of being prejudiced by this lapse of time, West Virginia could in her present prosperity and affluence—largely the result of the development of her territory by lines of railway which had their inception in the works which represent millions of dollars of Virginia's debt,—pay twenty million dollars today, with less inconvenience and less burden upon her people, then she could have paid two million dollars in 1867.

Moreover, the defence of laches cannot be interposed against a State. In *Armstrong* v. *The Morrill*, 14 Wall. 144-5, the court citing *Stoughton* v. *Baker*, 4 Mass. 526, holds that no laches can be imputed to the government and that time does not run against a State.

In *Metropolitan R.* v. *Dist. of Columbia,* 132 U. S. 11, the court through Mr. Justice Bradley, says:

> "No restrictive laws apply to the sovereign unless so expressed. And especially no laws affecting a right on the ground of neglect or laches, because neglect or laches cannot be imputed to him. And it matters not whether the sovereign be an individual monarch, or a republic, or a State. The principle applies to all sovereigns. The reason usually assigned for this prerogative is that the sovereign is not answerable for the delinquencies of his agents. But whatever the true reason may be such is the general law—such is the universal law, except where it is expressly waived."

See also *Weber* v. *Commissioners,* 18 Wall. 70. In *Gibson* v. *Chouteau,* 13 Wall. 99; *Lindsay* v. *Mill,* 6 Peters 673; *United States* v. *Knight,* 14 Peters 315; *United States* v. *Thompson,* 98 U. S. 489; *Gaussen* v. *United States,* 97 U. S. 584; *United States* v. *Nashville, etc. Ry.,* 118 U. S. 125, *supra.*

It is submitted that the transactions referred to in the cases relied on by the defendant related to such transaction as the protest of negotiable paper, or some entirely private matter where there was no public interest or duty whatever involved.

In *Brannock County* v. *Bell,* 101 American State Reports, 152-3, note 2, it is stated as a universal rule that statutes of limitation should not run against a State nor can laches be imputed to it, although private parties may be interested along with the State in the matter sued on. See authorities there cited.

In the opinion of the court on the demurrer in this cause (Vol. 1, p. 433 of West Virginia Complainant), the lapse of time is referred to, but the demurrer is over-

ruled and an order afterwards entered for an accounting upon the defendant's answer which in no manner refers to the matter. This of itself should preclude the question of laches.

Defendant's Second, Third, Fourth, Fifth and Sixth Exceptions.

These five exceptions will be considered together for they are based upon substantially identical grounds, and involve substantially identical questions.

They relate to the mode adopted by the Master for determining the value on January 1, 1861, of the shares of stock then held by Virginia, respectively, in the Richmond, Fredericksburg and Potomac; Orange and Alexandria; Richmond and Danville; Richmond and Petersburg; and Virginia Central Railroad Companies.

As to all of these, as well as other corporations in which the Commonwealth owned stock, the Master in his view of the case, was confronted with the difficult problem of determining what was the true value of those holdings fifty-four years ago.

We recognize and appreciate the difficulties of the situation, and the earnest purpose of the Master to find a solution of this problem which would be fair and just and in accordance with the truth.

As shown by the authorities cited by the Master in his discussion of this subject, at pp. 11 to 29 of his Report, and by other authorities to some of which we will refer, the sources of evidence as to the value of such properties are:

1. The expenses and earnings of each company, that is to say its dividend earning capacity, after making adequate provision for necessary repairs and renewals through a term of years.

2. The market prices of the shares, as shown by actual sales in sufficient amounts and number to give fairly reliable evidence that the shares have been or can be sold in quantity at those prices.

And, as evidence of these prices, the contemporaneous and financial market reports and stock quotations published from day to day and time to time, by reputable newspapers, whose reports are accepted, and acted upon by the business public, are accepted according to the great weight of authority, as among the most authentic and reliable sources of evidence as to such values.

3. The par value of the shares of such corporations, in exceptional cases and under certain conditions and subject to material qualifications of this proposition, and

4. The *book values* of the shares of a corporation, in exceptional cases and subject to like material qualifications.

In endeavoring to reach the value on January 1, 1861, of the shares of stock of these five railroad corporations, the Master combined his estimate of that value, based in each case upon the earnings of each of said railroad companies, with the value of their properties as shown by the "book values," deduced from the books of account of each company.

The Defendant's Exceptions are to the alleged error of the Master in not discarding the earnings of those companies from his consideration, and taking and accepting their alleged "book values" as final and conclusive evidence of their value.

We respectfully submit that the exceptions of the Defendant are without merit.

Not only so, but the learned Master erred in his computations of value based upon the earnings of those railroad companies in not making proper allowances for depreciation, renewals of the roadways, track, depots, rolling stock, and other physical properties of these companies.

An examination of his report, and of the testimony and statements in the record as to the operation and transactions of these companies, will show that no adequate deduction or allowance, or provision, was made by the respective companies, or has been made by the Master, to take care of this important item of cost and debit in the experience of every such company.

Considerable amounts were generally expended on repairs, but no account seems to have been taken in any of these cases and no such systematic provision made, such as sane and sound railroad practice requires to be made, to cover and provide for the depreciation and renewals of their properties.

Still, the net earnings of such companies even under such conditions, if averaged through a term of five or ten years of peace, afford a far more reliable criterion of the actual value of their properties, than do their book accounts.

The "book values" should not, under the proofs in this case, have been brought into the account, by the Master in computing the value of the shares of stock of said railroad companies.

There is, so far as we can see, no evidence in this case which justifies the acceptance of said "book values" as evidence, still less their acceptance as proofs of actual value.

The testimony of witnesses upon both sides shows that those "book values" represented merely the original cost of the respective railroad properties.

They show nothing definite or reliable whatever as to the actual subsequent values of those properties.

They make no deductions for wear and tear, and depreciation, nor for the cost of renewal, nor for the unremumerative character of the business developed by the respective railroads.

They are based upon the violent assumption (unsupported by any proofs, and negatived by the railroad experience of this country, and by the facts proved as to some of these very railroads) that every investment made by Virginia in these then comparatively new, and some of them unfinished railroads, was, not only a paying investment, but an investment which could be relied upon to be free from serious financial hazard and to yield through the years and decades to come, so large and so certain a net return upon the money invested as to give those shares of stock a certain value at least equal to the sums which had been expended upon these railroads respectively.

It is not necessary to refer to the railroad history and railroad experience of the country to show how utterly illusory, fallacious, and misleading any such evidence as proof of actual values, is; and how inconclusive, and unsatisfactory any computation based upon such assumptions must be.

That this is a just comment is shown by the fact that, we find that, if the book values of these companies are taken as evidence of true value, the absolutely worthless stock of such companies as the Virginia and Kentucky, the Manassas Gap, and the Roanoke Valley, and other like insolvent, or abandoned railroad companies, would appear to be just about as valuable as the stock

of solvent and comparatively prosperous companies such as the Richmond, Fredericksburg & Potomac R. R. Co., and the Richmond and Petersburg R. R. Co.

Another equally startling result of giving such credit to book values, is that the book values of the stocks of some of these companies as shown by the Defendant were actually greater in 1863, when as is notoriously true, the value of all such properties in Confederate Virginia, had been either wiped out or greatly depreciated by the wasting and destructive agencies of War, than those book values were shown to have been in January, 1861, before the War began.

For instance: The book value of the stock of the Richmond, Fredericksburg & Potomac R. R. Co., is given at 150, in January, 1861. (See Defendant's Exhibit No. 2, p. 2 E) and the book value of the same stock is given at 183.31 as of June 20, 1863 (See Defendant's Exhibit B-2, pp. 94, 95 E).

Orange and Alexandria R. R. Co. Book value as of January, 1861, given at 106.64. See Defendant's Exhibit No. 3, p. 13 E., and at 134.25 as of September 30, 1863. See Defendant's Exhibit No. 3, p. 108 E.

And so as to other railroad stocks claimed by Defendant as set-offs upon this extraordinary theory as to values.

But, in order to demonstrate the utter untrustworthiness of these "book values" as evidence of actual value, it will suffice to take the candid statements of Mr. Conway W. Hillman, the expert Accountant, the principal, and upon this point the only, witness for the Defendant, upon whose testimony this branch of their case is wholly based.

There is, to be sure, some inconsistency in his testimony as to what was the meaning and effect of the

words "Book value" of a stock as used by him; he sometimes stating one thing, and sometimes another, as at pages 19, 27, 99 and elsewhere in his examination in chief.

While this expert witness had stated more than once that the "book value" and the "actual value" of a stock were practically the same thing, on cross-examination he frankly and unreservedly admitted that he was in error in any such statement, and clearly conceded the want of probative value of such figures from the books and accounts of a corporation under the circumstances existing here. See pp. 314-318.

We here quote as follows from his testimony (Record, p. 315):

> "Q. Do I understand you now to testify as an expert that you would accept the value of stock shown on the books as constituting the true actual value of that stock without any further investigation?
>
> "A. No, sir, I would not.
>
> "Q. Then there must be a difference between book value and actual value, is there not?
>
> "A. Yes, sir, there is.
>
> "Q. Then you were wrong when you said that there was no difference, were you not?
>
> "A. Yes, sir, taking that view of it, that was not the proper statement."

And at page 454, and 455, in response to questions by the Master, Mr. Hillman testified as follows:

> "Q. If it was the policy of the road to minimize renewals and repairs and increase dividends, why, the natural tendency of that would be to decrease value, notwithstanding dividends may have been paid?
>
> "A. Yes, sir.
>
> "Q. On the other hand, if it was the policy of the

road to make liberal charges for depreciation, keep the renewal account or keep renewals up so that the road was in first class condition, that might minimize the dividend paying value and still leave the property worth very much more than the property would be under other conditions?

"A. Yes, sir.

"Q. The result of all that is here, that with these statements before us, we have not any definite information as to what policy was pursued in connection with any road?

"A. That is right.

"Q. Under these circumstances, state whether or not, in your judgment, the book value, or what was in your judgment the book value, under those conditions, should be entitled to receive in determining actual cash market value on a particular day. What I mean now is a practical proposition with our lack of knowledge and information of the conditions to which I have just called your attention.

"A. As roads were operated at that date, I would not like to accept the book value of the stock as its actual value.

"Q. Well, would it be fair to say this,—I don't want you to go any further than you can properly go, but I want to get your candid judgment about it,—would it be fair to say that under the conditions developed, that the element of book value was of more or less doubtful value in determining the actual cash market value on any particular day? Is that a fair statement of it in your judgment?

"A. Yes, sir; that is fair.

"Q. It is impossible, of course, for you to state anything definite in relation to it? That is, you cannot minimize by a percentage, because you have not any basis upon which to make any calculation; that is correct, is it not?

"A. That is correct.

"Q. And of course what you have done, and what we will all have to do of course, is to take the best

evidence possible, and then reach the safest and most satisfactory conclusion?

"A. Yes, sir."

It is due to this witness to say that, however anxious he may have been to aid the contentions of the defendant as far as he could do this consistently with truth, and however strong his bias may have naturally been in favor of the party who had employed him, whose case he had in large measure made up and presented by numerous schedules and exhibits, and who evidently depended upon his evidence to sustain her contentions, he could not go to the length of stating that the book value of the shares of stock of a railroad company or any other corporation was by itself conclusive, or indeed *prima facie* proof of anything as to either the sale value, or as to the actual or intrinsic value of those shares.

Taking Mr. Hillman's testimony upon this subject as a whole, it is manifest that his view merely was that the "book value" of a corporation's stock was its value as actually shown by the books of the company and not its true actual value, if the company should go into liquidation and be wound up, nor did it show the market value of that stock.

His testimony utterly failed to sustain the theory and contention of the Defendant's counsel that the "book value" of the shares of the Virginia railroad companies and the true value of those shares was identical, or that such "book value" alone was even *prima facie* evidence of real value. Mr. Hillman's candid statements on cross-examination show that such book values as are relied on by West Virginia in this case are utterly unreliable, misleading and wholly worthless as proofs.

As we have already indicated, there may be circumstances under which book values and also "par" values,

do afford competent and trustworthy evidence as to the value of the property and shares of a corporation, as for instance, in the case of a corporation whose assets consist of property or securities of known market, and readily convertible value, such as banks, trust companies, or other companies whose assets consist of property of known or readily ascertainable and readily obtainable, market values. In such cases the "book values" and also the "par" values, are based upon, not original cost, but upon actual commercial values, indeed are made up of such values, either in the shape of cash, or securities or property which can undoubtedly be easily and promptly converted into cash, as is true as to all solvent and well managed financial corporations; and as was doubtless in very large measure true as to the State banks in which Virginia had large holdings of stock in 1861.

But, it would be manifestly an error to assume any such state of facts as to a speculative enterprise like a Virginia railroad company in 1861 or 1863, without proof not only as to the value of its assets, but that those assets had a market and convertible value which made its shares worth what they had cost their holders.

But even in the case of such a solvent financial corporation, the cost of throwing it into liquidation, including the cost of realizing upon and distributing the avails thereof, should, of course, be deducted from the aggregate net value of its assets, after providing for debts and fixed charges, before determining the *pro rata* sum assignable to each share, as the actual value thereof. While the Master makes the very moderate allowance of five *per cent.* for the cost of winding up such a company, he, for the not very satisfactory reasons he gives, fails to make any allowance for the cost of wind-

ing up such companies in his ascertainment of the value of their shares.

We, of course, realize that the dividend earning capacity through a term of years, with just allowances for depreciation and renewals of their properties, may be one of the most satisfactory measures of the true value of their shares of stock, and our only criticism of the Master's findings in that regard is that he did not take the earnings of those companies for a sufficient period to afford assurance that they could be relied upon as continuing indefinitely for the future, and for the farther very important reason, that no adequate allowance was made for depreciation in value and renewals of their properties, among the most important factors to be brought into such an account.

Another just criticism of the method adopted by the Master in determining the value of the shares held by Virginia in these and other corporations is, that he discarded one of the most trustworthy and reliable measures of these values, namely, the market prices and market quotations of those shares, as shown by the contemporaneous market reports, and quotations, published in the financial columns of a reputable newspaper, which quotations and reports were considered, accepted, and acted upon as accurate and reliable by the commercial world and business public, which was in the habit of getting its information upon those subjects from the columns of that excellent journal.

The competency and sufficiency of such quotations and market reports thus published will be fully considered in connection with the presentation of the second branch of this argument in support of the Complainant's exceptions to the Master's Report.

Defendant's 7th and 16th Exceptions as to the Alex-

andria, Loudoun and Hampshire, and Manassas Gap R. R. Stock, Pages 48-49, *and* 107-110 *of the Master's Report.*

These two exceptions involve the same questions, namely, the competency and sufficiency of the par value of those stocks, as evidence, or as Defendant contends, as proof, in this case, of the true value of the shares of stock of those companies.

The "par" of these shares merely represented their "book" cost, that is their cost as shown by the book accounts of the respective companies.

Accordingly, it is evident that the question presented is in fact and in principle the same which is raised by West Virginia's contention that "book values" are proofs of the actual values of such shares.

The reasoning and the authorities upon which we rely in discussing the question of the competency and sufficiency of "book values," apply to these exceptions and effectually dispose of the contentions of opposing counsel in respect thereto.

As to these two railroad companies, however, it is proper to mention that each was the builder of an unfinished railway, that neither the assets of these roads, nor their capital stock is shown by any evidence whatever in the cause to have had either in 1861 or in 1863, any value whatever after paying the debts of the respective companies; that all that Virginia ever realized from her holdings in the Alexandria, Loudoun, and Hampshire R. R. Co. was $49,662.05 on the 25th of November, 1867; and for her large holdings in the Manassas Gap R. R. she never received a dollar, and it perished as an asset.

The statements of fact and the history of these items given by the Master as to the Alexandria, Loudoun, and

Hampshire R. R. Co. at pp. 48, 49 and as to the Manassas Gap R. R. Co. at pages 107 to 110, of his report, leave nothing to be added to show the manifest propriety of his findings.

Defendant's Eighth Exception, pp. 51-52 *of the Master's Report, as to debt paid by the Virginia and Tennessee R. R. Co.*

The Virginia and Tennessee R. R. Co. owed Virginia $1,000,000, secured by a mortgage on its road. In 1863 this railroad company made payments to the Second Auditor of Virginia aggregating $886,685.00 in Confederate currency, the currency in which transactions in Confederate Virginia were transacted. This is practically all that Virginia ever received distinctly on account of this claim.

The Master applies the Confederate scale to these payments to ascertain their value in lawful money, and charges Virginia with the value thus ascertained, with a rebate on account of interest, to carry the payment back to January 1, 1861, and apply it as of that date.

The Master states the facts and grounds upon which his conclusions rest with such clearness as to leave nothing to be added.

Defendant's Ninth Exception. Loan to Norfolk and Petersburg R. R. Co., pp. 55-58 *of Master's Report.*

The Master very fully and conclusively presents the facts and conclusions upon which this finding is founded, and demonstrates its propriety. We are content to submit this item upon the Master's statement of it.

Defendant's Tenth Exception. Loan to the United States Government and debt due by the United States to Virginia, pp. 67-70 *of Master's Report.*

The facts as to this matter are fairly and pretty fully stated by the Master. Upon these facts the claim of West Virginia is undoubtedly excessive.

The claim of Virginia *against* the United States was a very old and a *controverted* claim.

Virginia *owed* the United States a large *uncontroverted* debt, evidenced by her bonds in which the United States had invested a part of the Indian Trust Funds.

It doubtless never could and never would have been settled in the liberal manner in which it was finally adjusted under the Act of Congress of May 27, 1902, but for the fact that the United States held those Virginia bonds.

The United States, by the Act of May 27, 1902, made a special provision for the settlement of both the bonds of Virginia held by the United States, and the claim of Virginia against the United States.

That act provided that interest should be computed upon both demands in such fashion that the aggregate of principal and interest upon each demand should be as nearly equal as practicable, and authorized a settlement of the two claims as of the date at which such computation brought them nearest together, respectively in amounts.

The principal of the debt due the United States was much the larger, but the claim of Virginia had been standing for a much longer time.

Computing the interest in this way, the two demands were brought closest together in amount as of February 11, 1894, as of which date, upon the arbitrary terms prescribed by the Act of Congress there was $5.50 of a balance in favor of Virginia, which is all that was ever paid her on this account.

West Virginia, mending her hold as asserted in her

Answer, claims 23 1-2% of $1,130,821.31 as the credit to which she is entitled on account of this settlement with the United States.

When we consider that this liberal settlement was secured from the Congress of the United States solely through the efforts of Virginia and her representatives, prosecuted through years, without any help from West Virginia, and that it was largely *ex gratia* to Virginia, the finding of the Master is not unjust to West Virginia.

We prefer to leave that item where the Master's statement places it.

Defendant's Eleventh, Twelfth, Thirteenth and Fourteenth Exceptions in reference to value of stock held by Virginia in the Farmer's Bank of Virginia. The Bank of Virginia, The Bank of The Valley, and the Exchange Bank, pp. 85-90, *Master's Report.*

The Master charges Virginia on the basis of the book value of the shares she held in these banks, deducting five *per cent.* thereof as the cost of winding them up, and realizing upon and distributing the avails of their assets.

This was a very low estimate for this cost, particularly when their bills payable are taken to be all solvent, and collectable, as this finding of the Master assumes.

The Master's conclusions are, however, perhaps as near the truth as can now be attained. If there is any error in them, it is in his allowing only five *per cent.* as the cost of winding up these banks realizing upon all of their assets, and distributing the avails thereof among the parties entitled. Or else the Master erred in assuming that the value of those shares must be ascertained by throwing those banks into liquidation.

The shares of all of those banks, except the Bank of the Valley, are shown by the Master's Report, to have had market values, and if we were disposed to question the Master's findings, we could fairly insist that he should have taken that very definite and reliable evidence as proof the true value of those shares; but we are content to accept his conclusions as to the value of these bank shares.

Defendant's Fifteenth Exception, Atlantic, Mississippi and Ohio R. R. Co., pp. 95-98 *of Master's Report.*

The Master has quite fully, and very fairly stated the facts in reference to this transaction and the reasons for his findings.

His conclusions are supported by all of the circumstances surrounding the transaction. There is no evidence anywhere in the record showing or tending to show that the properties sold had any larger value on the 1st of January, 1861, than the amount finally realized for them by Virginia.

We rest upon the Master's findings and his reasons therefor.

This ends our response to the Defendant's Exceptions, and the questions they present, except, as to the competency and sufficiency of the price lists, prices current, market quotations, and financial reports, published in the contemporaneous financial columns of reputable newspapers of the community in which these companies had their *situs*, as evidence of the value of their shares, which question will be fully discussed by us in connection with the consideration of the Complainant's Exceptions to the Master's Report.

II.

THE COMPLAINANT'S EXCEPTIONS TO THE MASTER'S REPORT.

Complainant's Exception, No. 1 is to the following findings which we quote from Page 10 of his Report:

> "The only right that West Virginia acquired as to these assets or investments, as against Virginia, was the right to require Virginia, on the date agreed upon, to apply the assets or investments, at their fair value at the time agreed upon, towards the liquidation of her own debt; so that West Virginia could know, when the assets were so applied; the amount of the real debt remaining to which she would be obliged to contribute. It was perfectly competent for the two States to agree upon any date upon which the debt and the value of the assets and the investments, and the difference between the two, could be ascertained. West Virginia's rights do not depend upon any title that she acquired to assets solely owned by Virginia, as to which she did not, and could not acquire any title, but they do depend upon the agreement of Virginia to account for these assets or investments, at their fair value upon the date when the amount of the debt is to be ascertained. This is an absolute protection to West Virginia, as Virginia cannot recover any portion of the debt of West Virginia until those assets are thus accounted for and applied. This construction is in my judgment plain, clear, simple, equitable, just, and completely and adequately protects every legal and equitable right of both of the parties thereto.
>
> "It is my conclusion, therefore, that the assets are to be valued as of January 1st, 1861."

It is an axiomatic proposition, that, unless there was some agreement between the two States, by which it was stipulated that a different date should be adopted

for determining the values of any set-offs with which Virginia was to be charged, and for which West Virginia was to receive credit in determining her equitable share of the common indebtedness, those values would necessarily have to be determined, as of the date upon which the new State went off from the parent State.

There can be no question as to the correctness of this postulate.

West Virginia could have no rights before she came into existence.

To fix any other date for ascertaining those values there would have to be a specific agreement to that effect. Virginia denies that there ever was any such agreement, and calls for proof.

To this, West Virginia responds that the contract which binds the two States to take a date for the valuation of the assets retained by Virginia different from the 20th of June, 1863, the day when the new State came into being, is to be deduced from the 8th section of the VIII Article of the first West Virginia Constitution, which prescribed West Virginia's undertakings and agreement in reference to the Virginia debt.

There is not a word or a syllable in the language of that section in reference to either "assets" or "set-offs," nor any words which can be construed to import those terms or to include or refer to them. All that that section stipulates is that:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of anuary, 1861, shall be assumed by this State;"

and to prescribe the specific provision which shall be made by the new State for the payment of the interest or principal of the "proportion" so assumed.

This language merely defines the debt, an equitable

proportion of which West Virginia assumed, as the debt existing before January 1, 1861, that is the debt of the Commonwealth existing on the 31st of December, 1860. It says nothing, nor can it be reasonably construed to prescribe anything, as to how West Virginia's share of that debt shall be ascertained.

The debt of Virginia and the amount and character thereof are undoubtedly determined by the terms thus used; but there is no limitation or determination, as to West Virginia's equities or set-offs against that debt. As a result, those set-offs and equities could, in the nature of things, only be such as West Virginia was entitled to when she first came into existence.

From West Virginia's standpoint her equities were not limited by those terms to such equities as existed in her favor on the 31st of December, 1860, because there could have been no equities at that date in favor of West Virginia or against Virginia, more than two years and five months before the new State had any existence, in fact long before she had become an embryo in the womb of the future.

To give the language of this "compact" between the two states the retroactive and unexpressed and unintimated effect which adverse counsel claim for it, and which the Master has, without giving any plausible reason for his conclusion, conceded, would be, by strained, unnatural and unnecessary *construction*, to create a new term and inject a new and novel stipulation into the contract of the parties.

Such an extraordinary covenant would have to be express, or derived by necessary and *inevitable* implication from the language of the "compact."

It must not be the deduction from a forced, a fanciful, or an unnecessary implication from the language of that compact.

Still less can it be sustained or entertained if, as is the case here, such construction requires the interpolation of new terms into the language used by the contracting parties, so as to make the words "existing before January 1, 1861" apply not only, as they were designed to do, to the character and amount of the debt, an equitable proportion of which the new State was to assume, but to the date as of which any equities to which West Virginia was to be entitled should be ascertained.

In considering the branch of this case arising under the Supplemental Answer of the Defendant (which is in effect a bill of review and a cross bill) it must not be forgotten that the burden of proof is upon her; and that this Court has in this very case emphatically declared that:

> "It is enough to refer to the circumstances in which the separation took place to show that Virginia is entitled to the benefit of *any doubt* (italics ours) so far as the construction of the contract is concerned."
>
> Decision of this Court rendered March 6, 1911, 220 U. S. 1.

The allusion in this language of the Court to the "circumstances in which the separation" of the two States "took place," had reference, undoubtedly, to the fact that West Virginian citizens of Virginia undertook to speak and act for and deal with West Virginian citizens of Virginia in all of the transactions and stipulations leading up to, and finally consummated in the creation of, the new State,—Western Virginians, and largely the same persons, on one day acting and speaking for and in the name of and undertaking to bind Virginia, and on the next day acting and speaking as the representatives of West Virginia, while more than two-thirds

of the actual population and political sub-divisions of Virginia actually had no part, nor lot, nor agency, nor representation in anything which was done, or purported to have been done, in their name, and on their behalf.

This tremendous fact was taken cognizance of by this Court in the former stages of this litigation and cannot be ignored in this, which is, we trust, its final stage, without palpable injustice to Virginia.

This circumstance and the ruling of this Court above quoted, should be borne in mind in all our consideration of this cause.

The importance of the question involved in this, the principal exception of the Complainant, is such, that we beg leave, at the risk of some repetition to recapitulate the grounds upon which this, our main objection to the Master's Report, rests.

West Virginia came into existence on the 20th of June, 1863.

Independently of any agreement between the parties fixing a different date, not only would the amount of the debt of the undivided state be ascertained as of that date, but all of the rights of the two states in respect thereto would be necessarily and properly determined as of the same crucial date.

For reasons satisfactory to the West Virginians who, controlling the whole situation during the formative period of that State, undertook to speak, and did speak, both for the Revolutionary, or Restored Government of Virginia, and also for West Virginia, they fixed the 31st of December, 1860, as the date as of which the debt of Virginia, an equitable proportion of which the new state agreed to assume, should be ascertained.

To all intents and purposes that was an arbitary date, but it was doubtless adopted to exempt West Vir-

ginia from any liability for the debts or contracts of the Richmond or "Confederate" Government of Virginia, contracted after the Secession of the State from the Union, and after the Representatives from Northwestern Virginia Counties in the Virginia Constitutional Convention, then in session, had withdrawn from that convention and returned to their homes, where they were engaged in organizing a revolt against the Richmond Government, and in forming the revolutionary or Restored Government of Virginia.

While June 11, 1861, the date of the organization of the Revolutionary or "Restored" Government of Virginia, would have been, from the standpoint of the makers of that government, a more fit and more logical date to be prescribed for the ascertainment of the debt, a part of which West Virginia was to pay,—in the hurly-burly and confusion in which events were transpiring in that eventful period, there was little time for reflection, and January 1, 1861, or rather December 31, 1860, was adopted by those Northwestern Virginians as the date as of which the Virginia debt, an equitable portion of which West Virginia was to pay, should be ascertained.

There was no difficulty about taking that date or any other date prior to the formation of West Virginia as the date as of which the debt should be ascertained, and there was no injustice in this particular instance in adopting the date chosen, except that, whether designed to have such effect or not, it did operate to exclude from the thus recognized Virginia debt, over $1,509,150.02 of obligations afterwards issued by the State in discharge of liabilities for work done on the Covington & Ohio Railroad, and other railways under contracts entered into before the Secession of the State, for which West Virginians were legally and equitably as much liable as for

any other part of the debt. See Plaintiff's Supplemental Exhibit, No. 1, 289 E.

Still there was, from West Virginia's standpoint, a reason why a date prior to the secession of the State should be selected for the fixing of the debt, a portion of which she was to pay, namely, the avoidance of liability upon the New State for debts contracted by the Richmond Government after the Secession of the State; and there was also a reason, arising from convenience of computation and ascertainment of the debt for taking the end of the preceding calendar year, the period also of a half yearly rest in calculation and payment of interest, as the date for ascertaining this debt.

So that may have been all well enough, at least from West Virginia's point of view; but there was no reason for ascertaining the credits or set-offs to which West Virginia might be entitled against her liability for a part of that debt as of December 31, 1860, or any other date except June 20, 1863. Indeed, there was and is every reason why no other date except June 20, 1863, should be adopted for determining what credits West Virginia was entitled to be allowed.

As to that matter, any other date would not only be an arbitrary, but an unjustly arbitrary date, and possibly more unjust in its operation upon the rights of West Virginia than upon the rights of Virginia.

In the first place it would be illogical, if not an absolute solecism, to attempt to give to West Virginia, more than two years and five months before she had any existence, a credit for what Virginia could not by any possibility then have received, and for what West Virginia could not by any possibility, more than two years before she was born, and months before she was even conceived, have had any right, title, or claim, whatever.

To have attempted to have adopted any such ret-

roactive scheme of adjustment would have not only been unjust but impracticable.

Nor was anything of the kind done or attempted by the West Virginians who formulated both the First Constitution for that State, and the Act of Legislature of "Restored Virginia" of May 13, 1862, which gave Virginia's consent to the formation of the new State "under the provisions" of that Constitution.

The men who framed and adopted those enactments at the time they formulated them doubtless counted upon the settlement between the two states being made upon the terms prescribed in the 9th section of the Wheeling Ordinance, with which those West Virginian Constitution and Law-Makers were entirely familiar, for, both that ordinance, constitution, and the act of May 13, 1862, were largely the products of the same wills, minds, and brains. They had no idea then that any settlement would be made upon the principles adopted by the Court, and they never, for a moment, contemplated any such equitable set-off being asserted against her liability for the debt, as West Virginia now seeks to set up.

Whether for this, or some other reason, they certainly did not in any term of the stipulation by which they bound West Virginia to pay an equitable proportion of the debt as it stood on December 31, 1860, provide that the equities which West Virginia should be allowed should be such, and only such, as she might be entitled to upon that prenatal day, more than two years before her entrance upon the stage of existence, and when it was imply impossible that she could have any rights or obligations whatever.

It is true that the supplemental answer of the Defendant with a singular inaccuracy of statement, repeatedly alleges that at sundry periods before January 1, 1861, that is to say between 1822 and 1861, and there-

fore at times long before West Virginia had any existence, the State of Virginia, "with the common funds of the two states bought stocks," etc. (See pp. 26, 27, 30, 33 of said Answer.)

It may be that those strangely inexact averments were designed to give some color to the present contentions of the defendant's counsel which by some sort of marvelous psychological sleight of hand undertake to project the personality and coroporate existence of West Virginia backwards for some years or decades before that State had any existence, and to assign to her when she was as yet "without form and void," rights and interests which only an existent, corporate, responsible state could possess.

It suffices as a complete reply to this strange and unwarranted contention to say that, while it was agreed by the Restored Government of Virginia and the New State that the recognized debt, an equitable share of which West Virginia was to pay, was the public debt of the Commonwealth prior to January 1, 1861, it was never agreed between them that the set-offs and credits which West Virginia should be allowed against that indebtedness, should be such, and only such, as accrued to her prior to January 1, 1861.

The compact between the Old and the New State did undertake to determine, somewhat arbitrarily, the amount and character of the debt, a part of which West Virginia should pay, by reference to an antecedent date, but it did not undertake to provide for credits or to fix the date as of which West Virginia should be entitled to such credits or set-offs against that indebtedness.

The unquestionable fact is, that neither State, that is to say, that the men who constituted the legislatures and conventions of the two states, none of them had any

such matter or question in mind. They merely intended to limit West Virginia's accountability to her equitable share of the debt as it stood on the 31st day of December, 1860, expecting, if not counting upon it, that that equitable share would be computed in the mode prescribed by "The Wheeling Ordinance," a method which, as it turns out, would have placed at least as large, if not a larger liability upon the New State, than that ascertained by the Court in its decree of March 6, 1911, and a liability against which there could have been, by the terms of that Ordinance, no set-offs whatever, such as those which West Virginia is now asserting a right to set up (see Ninth Section of the Wheeling Ordinance, Appendix to the Record, pp. 119-123, and decision of this Court, 220 U. S. 1).

The conclusion from these indisputable premises is that June 20, 1863, the date when West Virginia became a state, and for the first time vested with any rights or obligations in the premises, is the date as of which any possible right, or set-off, or of credit, then existing in her favor, shall accrue and be applied in her favor in determining the amount she owes.

COMPLAINANT'S EXCEPTION, NUMBER 2.

The reasons here urged in support of Complainant's exception No. 1, apply with identical force to her exception No. 2, which presents merely the correlative of the same proposition.

COMPLAINANT'S EXCEPTION NO. 3,
which is as follows:

Complainant's Exception, No. 3.

Complainant respectfully excepts to the master's report and the findings and conclusions thereof, for this.

to-wit: that, in ascertaining and computing the value on January 1, 1861, of the shares of the capital stock of railroad companies the master erred, in that, disregarding other and competent evidence as to said values, he took and considered, solely, the "book values," and the alleged paper earnings of said companies for the periods more or less arbitrarily selected by him, as the same were inaccurately deduced from the book accounts of said companies, as evidence of the true value of said shares, as of said date.

Said "book values" did not constitute any valid or reliable evidence as to the true value of said properties inasmuch as they represented merely the original cost thereof; and both the said "book values" and the said "paper earnings" are unreliable and misleading as evidence of the true values of said properties because, in their computation no account whatever was taken of the depreciation and necessary cost of renewal of the physical properties of said companies.

This exception is respectfully taken and is asked to be considered as taken (as though the same were in each instance reiterated), to the findings and conclusions of the master, as expressed, and to the method by which the same were reached, as said method and findings are set forth: as to the holdings of Virginia in the Richmond, Fredericksburg & Potomac R. R. Co. at pages 32, 33 and 34 of the master's report; as to the Orange and Alexandria R. R. Co. at pages 36, 37 and 38; as to the Richmond and Danville R. R. Co. at pages 39, 40 and 41; as to the Richmond and Petersburg R. R. Co. at pages 42, 43 and 44; and as to the Virginia Central R. R. Co. at pages 45 and 46 of said report.

Our views as to the incompetency and probative worthlessness of "book values" as evidence of the value

of the shares of these Virginia railroad companies, either in 1861 or in 1863, presented in the former part of this brief as our response to the Defendant's 2d, 3d, 4th, 5th and 6th Exceptions, apply with equal force to, and are relied upon in support of this 3rd exception of the complainant.

Supplementing what we have there said, we would call attention to the error of the Master in discarding or ignoring the market reports, prices current, market quotations, and financial reports of the shares of most of the corporations in which Virginia retained her holdings on and after June 30, 1863, which, in most cases, constitute the most dependable, the most definite, and the best evidence, now obtainable, as to the value of those shares, either on the 1st of January, 1861, the date adopted by the Master for ascertaining their value, or on the 20th of June, 1865, the date which should have been accepted by him therefor.

The following facts and considerations are respectfully submitted in support of the competency of such evidence:

MARKET QUOTATIONS AS EVIDENCE OF VALUE.

The great preponderance of authorities, who in this regard are in harmony with the experience and common sense of mankind, sustain the proposition that the market values, and market quotations of such securities constitute competent and important evidence as to their true value.

A good deal of evidence was put into the record as to the market quotations of the shares of most of these companies.

The Master rejects all of it for the reason, as we understand his view, that the transactions reported were not of sufficient volume and frequency to justify their acceptance as proof of value.

There was some question raised by defendant's counsel as to the competency of market reports published in the financial columns of reputable contemporaneous newspapers as evidence of the market value of the stocks and bonds therein mentioned.

That question has been pretty effectually disposed of and put at rest by the decisions of the courts and the conclusions of authorities of the greatest weight, some of which are cited by the Master.

The subject is discussed in Greenleaf on Evidence, (16th Edition, by Wigmore) and the rule now generally accepted is approved and concisely stated in section 162-L, page 270, Vol. I, in the following explicit language:

> "(1) *A number of Courts, constantly increasing, receive the reports of market prices as published in trade journals, or ordinary newspapers,* commonly resorted to for such information, or in price-current lists by wholesale dealers generally recognized as trustworthy. The doctrine dates from the case of *Cliquot's Champagne and Sisson* v. *R. Co.*, and, with more or less variation of phrasing, has received wide recognition."

In addition to those mentioned in the text, the author cites a number of authorities in the foot note.

Nowhere is the rule of reason, and of common sense, on which we rely, more clearly or conclusively stated, than by one of the most learned and accurate and ablest jurists of our country, Judge Cooley, in delivering the

unanimous decision of the Supreme Court of Michigan in *Sission* v. *Toledo R. R. Co.*, 14 Michigan 489, 90 Am. Dec. 252, 255, in which he says:

> "We also think that the court erred in excluding evidence of the state of the markets as derived from the market reports in the newspapers. The precise question involved does not appear to have been passed upon by the court; but we are aware of no reason and no authority which would exclude the evidence. In *Lush* v. *Druse*, 4 Wend. 317, the value of wheat at a certain point was allowed to be proved by a witness who had derived his knowledge solely from the books of large dealers in wheat at that place; and *in re* Fennerstein's Champagne, recently decided by the Supreme Court of the United States, 3 Wall. 145, the market value of articles of merchandise at a particular place in a foreign country was held provable by letters written by third persons, offering to sell at specified rates. The principle which supports these cases will allow the market reports of such newspapers as the commercial world rely upon to be given in evidence. As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are for more satisfactory and reliable than individual entries, or individual sales or inquiries; and courts would be justly the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character."

"*Whelan* v. *Lynch*, 60 N. Y., which seems to have been followed by the Supreme Court of Appeals of Virginia in *N. & W. R. R. Co.* v. *Reeves*, 97 Va. 284-289, is directly in conflict with *Terry* v. *McNeil*, 58

Barb. 241, which the court in *Whalen* v. *Lynch* do not undertake to overrule, but evidently misconstrue, as is pointed out in the note to *Sisson* v. *Cleveland*, in 90 Am. Dec., in which some of the cases in direct conflict with *Whelan* v. *Lynch* are discussed. 90 Am. Dec. 255."

"When subjected to the test of reason and authority the decisions in both *Whelan* v. *Lynch* and *N. & W. R. R. Co.* v. *Reeves* will be found to be erroneous to the extent that they are inconsistent with the rule as established by the authorities which we cite."

"It must be remembered in this connection that *Whelan* v. *Lynch and N. & W. R. R. Co.* v. *Reeves*, involved transactions of recent occurrence, as to which there must have been no difficulty in obtaining ample and direct proof as to the value of the property in controversy, while in this case the market reports and quotations constitute the best evidence obtainable."

Fortunately for the ends of justice, neither *Whelan* v. *Lynch*, nor *N. & W. R. R. Co.* v. *Reeves* (if indeed they mean what opposing counsel claim for them) are binding authorities in this jurisdiction, particularly when, as to this question, the Supreme Court of the United States has adjudicated the question adversely to those decisions, as West Virginia's counsel construe and extend them.

In Clicquot's Champagne, 3 Wall. 114, prices—current, obtained from dealers of manufactured articles, which had been prepared and used by them in the ordinary course of their business, and which were objected to on the ground, among others, that they were hearsay, that no actual transactions were based on them, that the price lists were not connected with the wine in controversy, and that the wines enumerated did not appear to

be of the same quality as the wines in question, and though the price list referred to was not furnished by witnesses under oath, were admitted in evidence, this court holding that it was competent evidence, which should be admitted in the interest of truth. In making this decision, the United States Supreme Court says:

> "While courts in the administration of the law of evidence should be careful not to open the door to falsehood they should be equally careful not to shut out truth. They should not encumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy,—itself a serious evil,—without giving any additional safeguard to the interest of justice. We think the price current is not liable to the objection that it was hearsay. It was prepared and used by the party who furnished it in the ordinary course of his business. It is as little liable to that objection as the entries in the books of the dealer, or his answers to the inquiries of a witness, both of which were admissible upon the authority of the case referred to in Wendell. It was clearly relevant. What effect it should have, in connection with the other evidence adduced by the parties, was a question for the jury."

By the same token the price lists and market reports introduced by the Plaintiff in this case are clearly competent evidence.

The language of this decision may have gone further than was necessary to justify the conclusion reached, for the price lists in that case seem to have been furnished by the agents of Clicquot and were admissible on that account; but though to that extent *obiter*, the statements and reasoning of such an "*obiter*" by the highest court in the land are strongly persuasive as authority.

The doctrine enunciated in Clicquot's Champagne, 3 Wall., 114-115, was confirmed, emphasized, and extended, in Fennerstein's Champagne, 3 Wall. 14-149 in which it was held, that:

> "Letters to third persons from foreign dealers in regard to the prices of an article in a foreign country, are admissible to prove such prices." Syllabus of case, 3 Wall. 145.

This case carried the doctrine farther than it is necessary that it shall be carried to sustain the competency of the market reports published in the Richmond Dispatch, which the plaintiff has tendered as evidence of the market value of the securities mentioned therein.

Again, we find the rule of evidence and of reason which we advocate, reaffirmed by the United States Supreme Court in *Chaffee* v. *The United States*, 18 Wall. 516, where the Court says:

> "Market value is a matter of opinion which may require for its formation the consideration of a great variety of facts. To arrive at a just conclusion prices—current, sales, shipments, letters from dealers and manufacturers may properly receive consideration."

Such are the decisions of the tribunal of last resort in our land,—the very court in which this case is now pending.

The following very recent cases decided by the Supreme Court of North Carolina are the latest decisions upon this question, and sanction the wise rule established by the authorities above cited.

In *Moseley* v. *Johnson*, 144 N. C., 25, 56 S. E. 922, that Court held, at page 927:

"In this connection it is contended that his Honor erred in permitting quotations from the market reports of the Morning News, a daily newspaper published in Georgia, showing quotations for these debentures, and also of the Ocean Steamship Company bonds, under date of June 1, 1904. These were Georgia corporate securities and had a market value in that State . . . The competency of such evidence is settled. In this State it is held that market reports of such newspapers as the commercial world rely on, are admissible as evidence of market values." *Fairley* v. *Smith*, 87 N. C. 367, 42 A. M Rep. 522; *Sisson* v. *Ry. Co.*, 14 Mich. 496, 90 Am. Dec. 252; 3 Wigmore on Evidence, Sec. 1704; 1 Elliott on Evidence, Sec. 419.

The same doctrine is reaffirmed by the North Carolina Appellate Court in *Ferebee* v. *Berry*, decided February 16, 1915, reported in Advance Sheet, S. E. Reporter, Vol. 84, No. 9, page 262, issued March 13, 1915, as follows:

"Market reports, properly compiled and published in such newspapers as the commercial world relies on in the conduct of business and important affairs, are admissible in evidence of market values." Citing Moseley v. *Johnson*, 144 N. C. 257, 56 S. E. 922.

But not content with relying upon these adjudications, the Plaintiff has gone farther, and as far as it was practicable, or could be reasonably required, even if *Whelan* v. *Lynch* and *N. & W. R. R. Co.* v. *Reeves* were binding decisions in this case, has put into the case evidence, which meets, as far as can be reasonably expected, the points made against Market reports and prices-current, in *Whelan* v. *Lynch* and in *N. & W. R. R. Co.* v.

Reeves, by proving conclusively and abundantly, that:

1st. The Richmond Dispatch in which these market reports and price lists were published was a reputable and excedingly reliable newspaper, and that its financial and market reports were accepted, relied upon, and acted upon by the business public as true and trustworthy, and

2nd. By the evidence of living witnesses, and by the immutable testimony of the original books from which some of those published reports were derived, the sources of the information from which the prices given in those reports were obtained.

Under the controlling authorities which we have cited, or by logical and inevitable sequence from them, the current, contemporaneous market reports published in reputable newspapers in the community in which the stocks, securities and commodities are dealt in, bought and sold, constitute evidence, which is not only competent, but often, as in this case, the very best and most reliable evidence, in the nature of things obtainable, as to the value of the securities and commodities, in such community at the date of such reports; and like other historical papers and publications coming from trustworthy sources, *they prove themselves.*

But the plaintiff has supported the evidence as to the market reports, and market values of the stocks and bonds which are the subjects of this inquiry, by evidence which will be found to satisfy the most rigid requirements which can be reasonably prescribed, or which can be fairly deduced from *Whelan* v. *Lynch,* or any case which follows that questionable decision, as will be

seen from an examination of the testimony introduced into the cause on the 20th and 21st of November, 1914.

It will be observed that the market quotations of railroad and canal stocks and bonds, and bank stocks, and reports thereof, introduced into the cause and relied on by the Plaintiff, were chiefly those published in the Dispatch Newspaper in the City of Richmond, Virginia, in 1860, 1861 and 1863 and 1864, and copied into Plaintiff's Exhibit, No. 2, printed in the Record of the present hearing at pp. 311 to 321 E, and 333 to 344 E, inclusive, in each case, with such additional supplemental evidence, and schedules as have been put into the case since the last hearing before the Master.

It will be seen from an inspection of said schedules that a large number of said market quotations were based on the current reports of John A. Lancaster & Son, and Lancaster & Co., and of Davenport & Co., the first two firms, brokers, and the last named, stock auctioneers and brokers, doing business in Richmond during those periods.

Now, the Plaintiff has been exceedingly fortunate, after the lapse of more than half a century, in finding living witnesses of the highest character, and possessed of unusual opportunities for obtaining the facts in regard to the matters as to which they testify, and of great intelligence.

By these witnesses the following facts are proved:

Col. W. H. Palmer, 79 years of age, a man of large business experience, President of the National State and City Bank of Richmond, testifies first as to the character, reputation, and standing for business integrity, of the brokerage firms of John A. Lancaster & Son, Lancaster & Co., and Davenport & Co., and then as to character and standing of the Dispatch Newspaper, and of its

market quotations of stocks and bonds, and their acceptance as reliable and "correct."

His testimony is brief and we beg to quote the following extracts from it:

"Q2. Please state whether or not you were acquainted, by reputation or otherwise, with the firms of John A. Lancaster and Son, and Lancaster & Co., and Davenport & Co., during the period of the Civil War—prior thereto, and during that period?

"A. I knew of the firms in the brokerage business very well—Lancaster & Son before the war and after the war. I do not remember when Davenport & Co. commenced; but Lancaster and Co., I knew before the War. I dealt with them.

"Q3. Did you or not deal with Lancaster & Co. both before and during the War?

"A. Both before and after the war.

"Q4. I don't know whether your answer covered that, or not; were those firms, according to your recollection, engaged in business during the war?

"A. They were.

"Q5. How were they regarded, Colonel, in the business world?

"A. They were regarded as first class brokers.

"Q6. Were you, or not, familiar with the Dispatch, a newspaper published in the City of Richmond?

"A. Yes, I received it nearly every morning.

"Q7. Did your acquaintance with the Dispatch relate to the period both prior to and during the War

"A. Yes.

"Q8. What was the character and standing of that newspaper?

"A. Very high.

. . . . . .

"Q11. State whether or not you remember see-

ing market quotations published in the Dispatch, either prior to the War or during the Civil War—market quotations of stocks and bonds?

"A. Yes.

"Q12. In the name of what firm or firms were those publications made?

"A. I saw the market quotations both before and during the war. I take it that they were from those firms, but I could not swear that they were from those firms. I read the market quotations very regularly during the war, before and after the war, in the Dispatch.

"Q13. Then the market quotations of stocks and bonds did appear in the Richmond Dispatch, both before and during the period of the War?

"A. Yes, sir.

"Q14. And you frequently read them and consulted them?

"A. I read and consulted them, yes.

"Q15. How were they regarded, Colonel, with respect to their reliability?

"A. Absolutely as the transactions of the day and as correct."

"Re-Direct Examination:

"RDQ 1. You spoke, Colonel, of having a good many securities to handle during the war, and in that way had some independent knowledge of the market?

"A. Yes.

"RDQ. 2. Did you deal with Lancaster & Co.?

"A. I dealt with Lancaster & Co. before the war and after the war. I simply knew of the securities that were in my hands, belonging to an estate, and so on; but I naturally looked at the quotations published during the war, from having these securities. I examined the quotations for that reason, that I was interested in them.

"RDQ. 3. Then you did examine the quotations

that appeared in the Richmond Dispatch during the war, because you were interested in seeing what the market quotations were?

"A. Yes, sir.

"RDQ. 4. As a matter of fact, did your father have any connection with Lancaster & Co., in business; was he instrumental in starting them in business, or anything of that sort?

"A. My grandfather started Lancaster in business.

"RDQ. 5. Your grandfather started Lancaster in business?

"A. Yes.

"RDQ. 6. John A. Lancaster was in business then for many years before the war?

"A. Yes, my grandfather started the old man in business, and his son both, and I knew them, of course."

Col. John P. Branch (84 years of age), President of the Merchants National Bank, a man of large business experience, testified as follows: First, as to the reputable character and standing of the Dispatch newspaper and its market and financial reports, and their acceptance by the public, and then as to the standing, reputation, and character of John A. Lancaster and Son, and Lancaster and Co. for commercial integrity.

We quote as follows from his deposition, pp. 1237 to 1240:

"Q. 7. Were you acquainted with the Richmond Dispatch newspaper, as a newspaper, at that time?

"A. Yes. It was published in Richmond.

"Q. 8. What was the standing, reputation and character of that journal at that time?

"A. Very good.

"Q. 9. What was its standing as a journal giving

information upon financial matters—as to the information furnished by its financial columns?

"A. Well, sir, it was very reliable.

"Q. 10. Do you remember, Colonel Branch, anything as to the market quotations of the values of stocks and other securities appearing in that paper during that period, particularly from 1861 to 1863?

"A. I do not.

"Q. 11. You have no independent recollection of them?

"A. No.

"Q. 12. Do you know that there were such publications in the paper?

"A. Yes, they were published in the newspaper referred to by you.

"Q. 13. Can you state how they were esteemed and regarded by the business public in this community and in Virginia?

"A. Well, I can say, in Richmond and Petersburg, and the vicinity, very good.

"Q. 14. Can you say whether they were accepted by the public as reliable quotations of the values of those stocks and securities?

"A. They were accepted by the public—they were relied on by the public, as being true, so far as I know and believe.

"Q. 15. Were you acquainted with the firm of John A. Lancaster and Son, and its successor, the firm of Lancaster and Co.?

"A. I was, yes, and had business transactions with them.

"Q. 16. Do you know the standing and reputation of those firms, as brokers and bankers? If so, please state what the same was.

"A. They were considered very reliable people—reliable and honest.

"Q. 17. How were any stock quotations furnished by Lancaster and Son, or Lancaster & Co., and pub-

lished in the Richmond Dispatch or other newspapers, regarded by the public?

"A. I do not know, as a matter of fact, that they published any of these quotations, but the newspapers did publish them and stated that they were the quotations of these banking firms. What I mean by that is, I did not see the type put, or anything of that sort, but they were believed to be their quotations."

Mr. John B. Purcell, President of the First National Bank of Richmond, made the following statement, which it is agreed shall be taken and read as his testimony in the cause. Record, p. 89.

"I, John B. Purcell, of the City of Richmond, President of the First National Bank of Richmond, hereby certify that I have known the firms of Jno. A. Lancaster and Son, and Lancaster & Co., for many years up to the time the succeeding firm went out of business, and during this period was embraced the time occupied by the late Civil War in which I was engaged; that they were dealers in stocks and bonds and other securities in this City of Richmond, and that I further have known and seen advertisements of market reports of stock and bonds advertised to be sold and as sold in the financial columns of public prints. I have also been acquainted with the firm of Davenport & Co., of Richmond, who have been also dealers in stocks and bonds and are at this present day, and were during the period of the Civil War. The above firms were known to me as reputable concerns of this city.

"I recall financial notices and market reports in the Richmond Dispatch, a newspaper in good standing in the city of Richmond, and in the prints of its predecessor known as The Dispatch, and published in the city of Richmond, and that such market reports have always been regarded as dependable and relied upon by the business community of this city."

To the same effect is the testimony of Judge George L. Christian, lately president of the National Bank of Virginia of Richmond, James B. Pace, late president of the Planters National Bank of that city, and Richard W. Maury, who was a broker in Richmond during the period of the Civil War.

The above testimony is, under the authorities, sufficient to authenticate the market reports published in the commercial columns of the Dispatch newspaper, as shown by the files of that paper, kept and preserved by the Commonwealth of Virginia among the archives and historical and other papers and documents in her State Library.

But the plaintiff has put into the case even more explicit proofs.

All of this is corroborated by the testimony of Mr. John L. Williams, who was first a clerk in and afterwards a member of the firm of John A. Lancaster and Son, and Lancaster and Co., and is still more remarkably reinforced and confirmed by the concrete evidence as to the correctness of the stock quotations published in "The Dispatch" which is afforded by the old account books of Davenport & Co., a reputable firm of stock auctioneers and brokers doing business in Richmond, Virginia, from 1861 to 1864 inclusive and for years after that period.

Extraordinary as is the circumstance that seven such intelligent and credible witnesses, familiar with facts and conditions existing from fifty-one to fifty-four years ago, as have testified in this cause, five of them now or heretofore presidents of the foremost banks in that city, were still surviving in Richmond, to bear testimony to those facts,* a still more remarkable incident

in the progress of this cause, is the discovery and production in the case of the original books of account of Davenport & Co., the other principal firm of brokers and stock auctioneers, whose transactions and reports furnished in part the data for the market reports and price lists published in the columns of the Dispatch in 1861 and 1863, etc.

*Note: Two of these venerable witnesses, Mr. Branch and Mr. Williams, have died since they testified in this case.

It is a strange thing that the firm of Davenport & Co, which existed before and through the Civil War, should still survive, though, of course, with an entirely changed personnel. All those who were connected with it in the sixties have (doubtless) long since passed away.

But it is far more marvelous that the books of account of the predecessor firm of 1860 to 1865, surviving the mutations of half a century of change, including war and revolution, "destruction and reconstruction," should be now discovered in time to bring their irrefutable evidence into this case.

The incompetency of such books as evidence is urged by defendant's counsel, upon grounds which in the ordinary cases to which the doctrine which they invoke is applied, is undoubtedly a recognized rule, but which in a case like the present becomes the merest technicality, to be brushed aside in the interest of truth and right.

It was Lord Erskine who declared that "The reason of the law is the life of the law," a truth so manifest and so important that its utterance could not have been original with that great jurist.

It is true that books of account are not, under the general rule, competent evidence of what they show, unless they are proven by the oath of the responsible clerk or person who made the original entries in them, or, of such clerk or person be dead, or out of the jurisdiction of the court, then upon proof of his handwriting.

This is undoubtedly the general rule, except perhaps where such written evidence is sought to be introduced by third parties, that is by persons who were in no way parties to the accounts in question, as is the case here.

When such evidence is introduced by such third parties it is, we submit, competent, particularly if the entries in such book accounts were against the interest of the party making them, and were thus not self-serving, upon authenticating the book accounts in any way by legal proof.

The sole reason for requiring such accounts to be proved by the evidence of the bookkeeper who made the original entries, or, if that is impossible, then by proof of handwriting, is to authenticate such accounts, and to prevent fraud.

The ordinary general rule requires a deed or other instrument to be proved by proof of the signature, or of the due execution or acknowledgment of the instrument, by its maker, yet, where such a deed becomes, in legal parlance, "an ancient instrument," as after the lapse of thirty years or more, no such proof is required. Such an ancient instrument proves itself, if free from suspicion, and found in a rightful and proper custody.

The reasons which justify the admission of ancient deeds and written instruments without proof of their execution or of their handwriting apply with equal force

to the admission of such written records as appear upon these ancient books of Davenport & Co.

The four requirements which are prescribed, as conditions for admitting ancient writings, without proof of handwriting, are all satisfied as to these ancient books. **1 Greenleaf on Evidence, 16th Edition, Section 575-B, page 721 *et seq.***

(1) They have been in existence thirty years, indeed more than fifty years.

(2) They were found in a proper and rightful custody in the very depository and custody in which such books, if genuine, would be expected to be found. They were found in the old vault in the counting house of Davenport & Co., which was the depository of the old books of account of that firm, after they ceased to be used, and in which a large number of such old books were deposited.

(3) They not only have no suspicious appearance, but present upon their faces, and in themselves, the indisputable indicia of their genuineness.

The fourth requisite laid down by the authorities, namely: (4) "That there must be, if the writing purports to convey title to land, some other attendant circumstances corroborating its genuineness," etc., is also substantially satisfied as to these writings by the potential circumstance, amply proved by the testimony of Mr. Washington, Vol. 3, Supplemental Record, p. 176, etc., that the accuracy and authenticity of the entries made on the blotter of Davenport & Co. and carried forward to their day book, journal and ledger are shown by the fact that the same identical items, facts and figures ap-

pear in the contemporaneous daily issues of the Dispatch newspaper in the reports of sales made by Davenport & Co. upon those very dates.

This is proof as strong as Holy Writ. The authenticity and fact of the entries in these old books are thus confirmed by evidence far stronger than any proof of handwriting or any testimony based on human recollection could possibly be.

In addition to these conclusive indicia of truth, it is to be observed that all of these entries were made *ante litem motem,* and that many of them charging Davenport & Co. with the receipt of the proceeds of the sales of the stocks, etc., mentioned, were entries against the interest of the party making them and become competent evidence for that reason, not only of the facts adverse to the interests of Davenport & Co., but as to any other facts or circumstances which they disclose. 1 Greenleaf on Evidence, 16th Edition, Section 147.

In addition to the above grounds for their admissibility those entries in Davenport & Co.'s books constitute parts of the *res gestae* of the transactions to which they relate, and are competent evidence on that account, when the genuineness of the books is shown. Idem, §§ 575-B, paragraph (4), p. 720.

The rule dispensing with proof of handwriting, as to ancient writings, other than deeds or other instruments, applies to "entries and writings" such as those in these old books. *Id.* §§ 570, 578 and § 154, and the cases cited in footnote to §154.

These venerable books of account are in themselves facts, and facts of great significance.

It is utterly incredible that they could have been manufactured for any purpose sinister, or otherwise,

or could be other than they purport to be. And yet, in order to reject them as evidence, we are driven to the alternative presumption that these books were fabricated by somebody for some purpose; for if they are not genuine then they must have been so fraudulently made up and compiled, a conclusion against which any intelligent and impartial mind must revolt.

These books, presenting, as they do, upon their pages and in their very appearance, the evidence of their genuineness, found in the rightful and proper depository and custody of such records, confirmed in general and in every particular and detail by the contemporary publications in daily issues of the Richmond Dispatch, bearing upon their face entries which were against the interest of the parties making them, and which were of the *res gestae* of the transactions to which they relate, are not only evidence, but the very best and most satisfactory evidence of the facts which they record.

Comment has been made upon the fact that the market reports and quotations on which we rely are not those of a stock exchange like the present New York Stock Exchange, whose reports are everywhere accepted as evidence.

That is true. There was no such stock exchage in Richmond in 1861-1863; nor was there then in New York, and it is undoubtedly true that the market reports and quotations and prices current which by the overwhelming weight of authority in our country, dur-

ing more than half a century, have been accepted as evidence, were not the market reports or quotations furnished by any stock exchange.

Nevertheless such market reports and quotations from the financial columns of reputable newspapers have been accepted as evidence, if not as proof.

To fairly consider this question, it is neessary for us, as far as practicable, to put ourselves in the environment in which these transactions occurred, and to take account of the conditions there existing.

> "Richmond was then a comparatively small town of less than 50,000 inhabitants. There were comparatively few companies or enterprises in the region of which it was the financial center, the shares of which were the subjects of exchange and sale.
>
> "The transactions of that kind were at that time, everywhere in our country, far less frequent than they are now, but they did occur, and they were doubtless relatively of as much importance, and probably of as great interest to that little community, as larger transactions are today.
>
> "Lancaster & Son and Lancaster & Co. constituted at that time practically the stock exchange of Richmond.
>
> "They were relatively as important and as conspicuous in the financial life of that community as is the Richmond Stock Exchange today, or even as is the New York Stock Exchange in the business life of the Country. At all events they were a reputable and trust-worthy firm of brokers, and their market reports and quotations of stocks and bonds were accepted as true and were relied upon and acted upon by the business world whom they served."

It will not do to reject such evidence, when we are in search of the truth.

Notwithstanding the weight of the authorities, and the force of the facts and considerations above mentioned, the learned Master has discarded all of the evidence as to the values of these stocks, afforded by the contemporary financial and market reports, daily published in the financial columns of "the Dispatch", a reputable newspaper whose financial and market reports are proved to have been accepted and acted upon by the business public as entirely trust-worthy and accurate, and at the same time the Master has accepted and treated as evidence the unsupported statements and figures from the books of those companies as to the original cost of their several properties, and the amounts invested, and, it may be, sunk in prosecuting their respective ventures, as evidence, indeed in large measure, as proof of the value of those properties, and of shares in the respective enterprises, years, and in some instances decades, after those expenditures had been made.

COMPLAINANT'S EXCEPTION, NO. 4,

which is as follows:

> "Complainant respectfully excepts to the finding and conclusion of the master in allowing $149,984.00 as the basis for an item of charge against Virginia and of credit to West Virginia, being the value of a 'divided bond' of the Richmond, Fredericksburg and Potomac R. R. Co. held by Virginia, for which obligation Virginia realized only the equivalent of $19,111.11 in lawful money, that being the value of the Confederate currency in which said obligation was paid off by said company, which was all that the complainant ever realized or can ever realize from said dividend bond." (See Plaintiff's Exhibit, No. 3, 363 E.)

This item was for payments made to Virginia by the R. F. & P. R. R. Co. of $149,984.00 on account of a "dividend bond" of that company. The payment was made in Confederate money, in two instalments, the first of $27,520.00 on the 13th of March, 1863, and the second of $122,464.00 on July 1, 1863, the two sums aggregating $149,984.00. See Defendant's Exhibit, No. 3 (Asset 19), 44 E.

These payments charged against Virginia, having been made in Confederate money, should have been *scaled* by the Master, as were similar payments made by the Virginia & Tennessee R. R. Co. scaled by him. (See page 52 of his Report.)

Applying the scale the charge should have been $19,111.11. See Plaintiff's Exhibit, No. 3, 363 E.

COMPLAINANT'S EXCEPTION NO. 5.

As to the value of Virginia's holdings in the James River and Kanawha Company, pp. 100 to 106 of the Master's Report.

Complainant's Exception No. 5.

"Complainant further excepts to the findings and conclusions of the master as to the value as of January 1, 1861, of the holdings of Virginia in the James River and Kanawha Company, as set forth at pages 100 to 106 of his report, for the reason that said findings and conclusions and the grounds upon which they are based, are in conflict with the Master's former finding, and with the evidence in the cause, which demonstrates that after making the necessary, reasonable and moderate allowances for depreciation of its physical property, said company was to all practical intents and purposes insolvent on and after

January 1, 1861; and, at any rate, the holdings of Virginia therein, possessed no dividend earning capacity, and no appreciable value, whatever, on or after that date."

As the enterprise which this venerable company was organized to construct was a dream of the fathers of the Commonwealth, which unfortunately turned out to be an irridescent dream, so any hope or expectation that any dividends, or direct profits would ever be realized from its construction or operation, were by the inevitable logic of events, dispelled "like the baseless fabric of a vision."

From the time say in the fifties, when the practicability and desirability of transportation by railways ceased to be a problem, any such proposition as the James River and Kanawha canal ceased to be a possible financial success. In the Sixties some loyal and sanguine gentlemen, like Col. Thomas H. Ellis, the president of the company, and some optimistic adventeurers like M. Ernest Bellot des Minieres, still had very vivid dreams of the possibilities of the projected waterway, and they were willing, the former to grant and the latter to accept, an option to take over that company, on terms which would give the State for her $10,400,000 actual input (an input which had only yielded her about $10,000 in over twenty-five years) an annuity of $165,000, a year which could be extinguished by the cash payment of $2,225,000.

But after repeated and protracted efforts, by Monsieur Bellot des Minieros and his associates, who were vouched for as men who had the confidence of captilists, and could influence the investment of capital in promising ventures, were unable to secure from the monied men. and investors of the world, the funds necessary to carry

through that project, and it speedily lapsed, and signally failed to materialize.

The canal company dragged along a somewhat precarious existence throughout its entire career, without earning any net revenues down to 1860, running the gauntlet of disasters from freshets and from freezes, and escaping bankruptcy by the grace of God, and the generous assistance with which the Commonwealth from time to time came to its relief. Down to the fiscal year beginning September 30, 1860, it had run enormously in debt, and only by repeated grants of financial assistance by the State, was it enabled to keep its head above water.

In that year, Virginia, by the Act of her General Assembly, passed March 23, 1860 (Vol. 2), 67 E.,—came most generously to the relief of the canal company, assuming the entire amount of the large funded indebtedness of the company theretofore guaranteed by the State, releasing without a dollar of payment $360,000 of the indebtedness of the company to the State, accepting preferred stock of the company at par for that assumed indebtedness, and for the balance of the large debt already due by the company to the State, and actually advancing the company $200,000 to aid it in paying its large floating debt; and in addition to this, authorizing the company to create a paramount mortgage upon its works, property, and revenues to the amount of $2,500,000 for the purpose of completing the canal to Covington, "*carrying on their other works, and paying the residue of their floating debt.*"

The facts shown in this record and in the records of the company, show that the company was, if not actually insolvent, in failing circumstances when Virginia came thus liberally to its rescue in 1860. The only thing which had saved it from practical bankruptcy be-

fore that time was the fact that its principal and its preferred indebtedness was due to and controlled by such a generous and indulgent creditor as was Virginia.

By the Act of March 23, 1860, Virginia practically took over the canal.

From that time on as we shall presently see, the canal company was continually running behind, as indeed had been the case throughout its entire history, except that for the year 1836 it had an indicated earning of the large amount of $10,092.00.

In their efforts to give some value to Virginia's large nominal interest in this company the Defendant has adopted various more or less inconsistent theories and resorted to diverse claims, none of them supported by the facts.

In the Defendant's Supplemental Answer, she values that interest at $2,600,000 or 25 *per cent.* of $10,400,000 but that was merely a guess and a very wild guess absolutely unsupported by any proofs. See Defendant's Supplemental Answer, "Class G," pp. 59-60.

Then in Defendant's Exhibit, 1861, No. 7, Sheet 1, 58-59 E., the value of the canal property in 1861, is put at $5,437,341.38 and in Sheet II. of same exhibit at $5,410,429.54. See also Defendant's Exhibit, 1863. No. 7, 173-175 E.

Each of these estimates is based upon certain figures and estimates of value, which are furnished by the books and reports of the Richmond and Alleghany Railroad Company, in a self-serving effort to boost the affairs and particularly the stock of that company.

The wild extravagance of those figures, and their utter unreliability are shown by the fact that after the R. & A. R. R. Co. had built and equipped a railroad along the line of the canal 195 miles to Buchanan 34 miles thence

to Clifton Forge, with a branch of 21 miles to Lexington, making 250 miles in all, with sidings, yards, depots, and equipment, the cost of which to June, 1863, when the R. & A. R. R. Co. was thrown into liquidation and its property placed in the hands of receivers, was represented by two mortgages, one of $5,000,000 and the other for $4,000,000; and yet, that after expending the large sums representing the cost of that 250 miles of road upon the canal property, the whole property, including the Richmond Dock and the railroad, its branches and accesories and its franchises, was sold at public auction on the 15th of April, 1889, after due advertisement, when the entire works, property and rights of the company brought only $5,000,000, which, after paying the costs of suit and sale and the receivership, did not suffice to pay the principal sum of the bonds secured by said $5,000,000 mortgage.

If the entire property of the canal company, after having more than $5,000,000 expended upon it, brought at public auction only $5,000,000 it can hardly be contended that that property, before it was thus improved and enhanced in value, could have been worth any considerable sum, or indeed possessed any money value whatever.

Strongly confirmatory proof that the canal property was worth nothing after the payment of the debts which the canal company owed, is afforded by the fact that not only the State, but the private stock-holders of the canal company, agreed to the sale of the entire property of the canal company to the R. & A. R. R. Co., without the payment of a dollar either to the State or the private stockholders for their stock, upon the condition that the R. & A. R. R. Co. would build a railroad upon the general line of the canal from Richmond to Clifton Forge, with

a branch to Lexington, within twenty months from the sale and conveyance of the canal property to the said R. & A. R. R. Co., and would satisfy the debts and liabilities of the James River and Kanawha Company. See deed from the J. R. & K. Co. to the R. & A. R. R. Co. and the schedule of debts annexed thereto. 209-220 E., and the several Acts of Assembly of Virginia, at pp. 199-208 E.

The conveyance authorized by said Acts was made March 4, 1880, so that the railroad was required to be built by November 4, 1881.

The figures furnished by the records of the canal company, as shown by the schedule compiled by Mr. Potter, show that there was a deficit in the current receipts of the J. R. & K. Co. from its organization in 1835 down to September 30, 1860, *"of not less than* $1,302,955.75 *without making any allowance for the depreciation of its property"*. (To this sum, $1,302,955.75, there should be added the $360,000 of indebtedness which the State at that time gave and released to the company without receiving any return for it whatever.) See pp. 1187 to 1190 E. and Mr. Potter's testimony on the 9th of December, 1914, pp. 1338 to 1342.

Whether this deficit occasioned, as would ordinarily have been its effect, a corresponding impairment of the capital of the company or whether it caused a corresponding increase in the indebtedness of the company, which latter result seems to be in accordance with the facts, it certainly shows not only that the property of the company as then constituted, did not possess any earning capacity, but that the company was and had been for years losing and heavily losing money, so that its stock could not have possessed any considerable money value.

Considering its condition, the market quotations of its stock in 1861 and in 1863 were exceedingly high, even if the shares sold had been part of its $7,400,000 of preferred stock, instead of being, as was the case, doubtless shares of its common stock.

The master evidently had misgivings as to the correctness of his conclusions, for at the foot of page 105 of his Report, he says:

> "The average net returns for 25 years, $111,800, less the interest on $199,000, $11,940, is $99,860, I think it reasonable to assume that, if it had not been for the disturbing conditions caused by the war, this average might have been realized from the operations of the Company. This sum makes no allowance for depreciation; and there is nothing in the record, and I have not been able to find any data, which enables me to determine what allowance should be made therefor. I feel certain, however, that this property would require a substantial sum to take care of depreciation. In the absence of information, I do not feel at liberty to conjecture; and while I capitalize $99,850, as the only basis upon which I can predicate a conclusion, in doing so I feel that I reach an excessive valuation, particularly in view of its subsequent history. Capitalized at 6 per cent. we have a value of $1,664,333."

This concludes our review of the questions raised by the Defendant's and the Plaintiff's Exceptions.

The plaintiff desires only that such a result shall be reached by the decision of the Court as shall be in accordance with the legal and equitable rights of the parties.

Such a decree must place upon the new State a large sum on account of this long ignored obligation but one which West Virginia equitably owes and which the Com-

plainant is justly entitled to recover for those who have placed their interests in her keeping, and in her own behalf.

Respectfully submitted,

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April 15, 1915.